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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 378

JIMMIE BURNS, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 19, 1932

CERTIORARI GRANTED OCTOBER 17, 1932

(37,075)

(37,075)

SUPREME COURT OF THE UNITED STATES

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Names and Addresses of Attorneys.

For Defendant and Appellant:

OTTO CHRISTENSEN, Esq.,

1016 Broadway Arcade Building, Los Angeles, California.

For Plaintiff and Appellee:

SAMUEL W. McNABB, Esq.,

United States Attorney;

MILO E. ROWELL, Esq.,

Assistant United States Attorney,

Federal Building, Los Angeles, California.

UNITED STATES OF AMERICA, SS:

To UNITED STATES OF AMERICA, and SAMUEL W. McNABB, United States attorney for the Southern District of California, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 7th day of April, A. D. 1932, pursuant to an appeal, and order allowing appeal, filed in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain action entitled United States of America, plaintiff, vs. Jimmie Burns, et al, defendants, No. 10096-C, in which the said United States of America is plaintiff and Jimmie Burns defendant, and you are required to show cause, if any there be, why the final order and decision cancelling and nullifying the probation theretofore granted to the defendant Jimmie Burns in the said cause mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable GEORGE COSGRAVE United States District Judge for the Southern District of California, this 9th day of March, A. D. 1932, and of the Independence of the United States, the one hundred and fifty-sixth.

Geo. Cosgrave

U. S. District Judge for the Southern District of California.

Rec'd Copy March 10, 1931 S W McNabb U S Atty by Milo E Rowell Asst

[Endorsed]: In the United States Circuit Court of Appeals for the Ninth Circuit U. S. vs. J. Burns Citation Filed Mar 11 1932 R. S. Zimmerman, Clerk By G J. Murphy Deputy Clerk

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No..... Filed.....

Viol: Section 65 of the Federal Penal Code; Section 37 of the Federal Penal Code—Conspiracy to violate Section 3, Title II, of the National Prohibition Act of October 28, 1919; and Section 3, Title II of the National Prohibition Act of October 28, 1919, as amended March 2, 1929.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

At a stated term of said court, begun and holden at the City of Los Angeles, County of Los Angeles, within and for the Central Division of the Southern District of California on the first Monday of February in the year of our Lord one thousand nine hundred thirty:

The grand jurors for the United States of America, impaneled and sworn in the Central Division of the Southern District of California, and inquiring for the Southern District of California, upon their oath present:

That WALTER E. PATTERSON was at all times hereinafter in this indictment mentioned a duly appointed, qualified and acting Prohibition Agent in the Bureau of Prohibition of the Treasury Department of the United States, Twenty-Second District, and as such Prohibition

Agent was charged with the duty of stopping, searching and examining motor vehicles in said district in which he had probable cause to believe there was being transported intoxicating liquor fit for beverage purposes and containing more than one-half of one per cent of alcohol by volume, in violation of the National Prohibition Act.

And the grand jurors aforesaid, upon their oath aforesaid, do further present:

That JIMMY BURNS and JOE EDWARDS, hereinafter called the defendants, whose full and true names are, and the full and true name of each of whom is, other than as herein stated, to the grand jurors unknown, each late of the Central Division of the Southern District of California, heretofore, to-wit: on or about the 11th day of May, A. D. 1930, near Santa Barbara, County of Santa Barbara, in the state and district aforesaid, and in the Central Division of said district, and within the jurisdiction of the United States and of this Honorable Court, did knowingly, wilfully, unlawfully and feloniously use a deadly and dangerous weapon, to-wit: a shot gun, in resisting the said Walter E. Patterson, who was then and there a person authorized to make searches and seizures, in the execution of his duties as a Prohibition Agent as aforesaid, with intent on the part of the said defendants to commit a bodily injury upon him and to deter and prevent him from discharging his duty as such Prohibition Agent, in that they, the said defendants, did point said shot gun at the said Walter E. Patterson with intent to commit bodily injury upon him, the said Walter E. Patterson, and to deter and prevent him from searching, and examining a certain truck in which there was then and there being transported intoxicating liquors fit for bev-

erage purposes and containing more than one-half of one per cent of alcohol by volume, in violation of law, and in which said truck he, the said Walter E. Patterson, did then and there have probable cause to believe and did believe there was then and there being transported intoxicating liquor as aforesaid, and he, the said Walter E. Patterson, then and there being charged with the duty of examining and searching said truck, the defendants at all times mentioned in this indictment then and there well knowing that the said Walter E. Patterson was a duly qualified and acting Prohibition Agent in the Bureau of Prohibition of the Treasury Department of the United States.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

SECOND COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present:

That JIMMY BURNS and JOE EDWARDS, hereinafter called the defendants, whose full and true names are, and the full and true name of each of whom is, other than as herein stated, to the grand jurors unknown, each late of the Central Division of the Southern District of California, heretofore, to-wit: continuously throughout the period of time from on or about the 1st day of May, A. D. 1930, and thereafter, to and including the date of finding and presentation of this indictment, in the County of Santa Barbara, in the state and district aforesaid, and in the Central Division of said district, and within the jurisdiction of the United States and of this Honorable Court,

did then and there knowingly, wilfully, unlawfully, corruptly and feloniously conspire, combine, confederate, arrange and agree together and with each other and with divers other persons whose names are to the grand jurors unknown, to commit, in the said County of Santa Barbara, California, an offense against the United States of America and the laws thereof, the offense being to violate Title II of an Act of Congress of the United States approved October 28, 1919, commonly known and designated as the National Prohibition Act, that is to say, that they, the said defendants, would thereupon unlawfully, and in violation of Section 3, Title II of said Act, transport and possess large quantities of intoxicating liquor, which should then and there be fit and for use for beverage purposes and which should contain more than one-half of one per cent of alcohol by volume, neither of said defendants then and there having, nor intending thereafter to have, a permit from the Commissioner of Internal Revenue of the United States so to do.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that at the hereinafter stated times, in pursuance of, and in furtherance of, in execution of, and for the purpose of carrying out and to effect the object, design and purposes of said conspiracy, combination, confederation and agreement aforesaid, the hereinafter named defendants did commit the following overt acts at the hereinafter named places:

1. On or about the 11th day of May, 1930, defendants Jimmy Burns and Joe Edwards proceeded in a certain automobile along the San Marcos Road north of Santa Barbara, County of Santa Barbara, in the state and dis-

trict aforesaid, and in the Central Division of said district, and within the jurisdiction of the United States and of this Honorable Court.

2. On or about the 11th day of May, 1930, defendants Jimmy Burns and Joe Edwards pointed a sawed-off shot gun at one Walter E. Patterson at a point on the San Marcos Road north of Santa Barbara, County of Santa Barbara, in the state and district aforesaid, and in the Central Division of said district, and within the jurisdiction of the United States and of this Honorable Court.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

SECOND COUNT.

And the grand jurors aforesaid, upon their oath aforesaid, do further present:

That JIMMY BURNS and JOE EDWARDS, hereinafter called the defendants, whose full and true names are, and the full and true name of each of whom is, other than as herein stated, to the grand jurors unknown, each late of the Central Division of the Southern District of California, heretofore, to-wit: on or about the 11th day of May, A. D. 1930, near Santa Barbara, County of Santa Barbara, in the state and district aforesaid, and in the Central Division of said district, and within the jurisdiction of the United States and of this Honorable Court, did knowingly, wilfully, unlawfully and feloniously transport in a certain Dodge Truck automobile, bearing California state licens*t* No. PCC 866, Engine No. GB-14258, about one hundred ninety-seven (197) cases of intoxicat-

ing liquor for beverage purposes, then and there containing alcohol in excess of one-half of one per cent by volume; in violation of Section 3, Title II, of the National Prohibition Act of October 28, 1919, as amended March 2, 1929.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

SAMUEL W. McNABB,
United States Attorney,

W. R. Gallagher
Assistant United States Attorney.

[Endorsed]: No. 10,096-C United States District Court Southern District of California Central Division The United States of America vs. Jimmy Burns, and Joe Edwards Indictment Viol: Section 65 of the Federal Penal Code; Section 37 of the Federal Penal Code—Conspiracy to violate Section 3, Title II of the National Prohibition Act of Ocy. 28, 1919; and Sec. 3, Title II of the National Prohibition Act as amended. A true bill C M Staub Foreman. Filed Jul 25 1930 R. S. Zimmerman, Clerk, By Murray E Wire Deputy Clerk Bail, $10,000

At a stated term, to wit: The February Term, A. D. 1931, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, Calif. on Monday, the 4th day of May, in the year of our Lord one thousand nine hundred and thirty-one.

Present:

The Honorable GEORGE COSGRAVE, District Judge.

United States of America, Plaintiff,)
)
vs.) No. 10096-C-Crim.
)
Jimmy Burns, Defendant,)

This cause coming before the Court for pronouncement of sentence upon defendant Jimmy Burns; S. W. McNabb, United States Attorney, and J. Geo. Ohannesian, Assistant United States Attorney, appearing as counsel for the Government, and the defendant being present in court with his attorney, Ames Peterson, Esq., a statement of the facts of the case is made by S. W. McNabb, Esq., whereupon, the Court pronounces sentence upon Jimmy Burns for the crime of which he stands convicted, viz: Violation of Sections 65 and 37 of the Federal Penal Code; and, it is the judgment of the Court that the said defendant be imprisoned in the Los Angeles County Jail for the term and period of one year on the first count, pay a fine unto the United States of America in the sum of $2000 on the second count, and stand committed to the Los Angeles County Jail until paid; and that the said defendant be imprisoned in the United States Penitentiary at McNeil Island, State of Washington, for the period of five years on the third count of the Indictment; execution of said sentence of imprisonment on the third count is suspended during such time as the defendant reports regularly every three months in writing, beginning with this date, to the Federal Probation Officer of this court; during which time he entirely refrains from any violation of any law with the possible exception of parking and traffic ordinances,

and in all respects conduct himself as a law abiding citizen. In case of the violation of the terms of probation, the defendant will be brought before the Court and sentenced. Probation is granted for a period of five years.

DISTRICT COURT OF THE UNITED STATES OF AMERICA SOUTHERN DISTRICT OF CALIFORNIA

THE PRESIDENT OF THE UNITED STATES OF AMERICA To the Marshal of the United States for the Southern District of California—GREETING:

WHEREAS, at the February 1931 Term of the District Court of the United States of America for the Southern District of California, Central Division, held at the Court Room of said Court in the City and County of Los Angeles, in said District, to wit: On the 10th day of April, A. D. 1931, Jimmy Burns was convicted of the crime of violating section 65 of the Federal Penal Code/ section 37 of the Federal Penal Code, conspiracy to violate section 3, Title II of the N. P. A. etc. committed on or about the 11th day of May, 1930, near Santa Barbara, County of Santa Barbara, California and within the jurisdiction of said Court, contrary to the form of the statutes of the United States in such case made and provided, and against the peace and dignity of the said United States.

AND WHEREAS, on the 4th day of May, A. D. 1931 being a day in the said term of said Court, said Jimmy Burns was, for said crime of which he stood convicted as aforesaid by the judgment of said Court, ordered to be imprisoned in the Los Angeles County Jail for the term and period of one year on the first count of the indictment

NOW THIS IS TO COMMAND YOU, THE SAID MARSHAL, to take and keep and safely deliver the said Jimmy Burns into the custody of the Keeper and Warden, or other officer in charge of said jail forthwith.

AND THIS IS TO COMMAND YOU, THE SAID KEEPER AND WARDEN and other officers in charge of the said jail to receive from the United States Marshal of said Southern District of California, the said Jimmy Burns convicted and sentenced as aforesaid, and him, the said defendant safely to keep and detain in accordance with the aforesaid judgment.

safely keep and detain pursuant to the above judgment.

HEREIN FAIL NOT.

WITNESS the Honorable Geo. Cosgrave, Judge of the District Court of the United States for the (Seal) Southern District of California, and the seal thereof, at Los Angeles, in said District, on the 4th day of May, A. D. 1931.

R. S. ZIMMERMAN,
Clerk of said District Court.
Francis E. Cross
By Francis E. Cross
Deputy Clerk.

I, R. S. Zimmerman, Clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing to be a full, true, and correct copy of final Commitment issued in the case entitled: The United States of America vs.....

Attest my hand and seal of said District Court, this..... day of....., 193

R. S. ZIMMERMAN,
Clerk of said District Court.
By.....
Deputy.

The within Warrant of Commitment was received by me on the 4 day of May, 1931, and is returned executed this 4 day of May, 1931

A C Sittel
U. S. Marshal.

By Wm H Lessner
Deputy.

[Endorsed]: Criminal Docket No. 27711 No. 10096 C Crim. District Court of the United States Southern District of California Central Division The United States vs. Jimmy Burns Final Commitment Los Angeles County Jail for one year on the first count. Filed May 11 1931 R. S. Zimmerman Clerk By G. J. Murphy Deputy Clerk

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UNITED STATES OF AMERICA

Southern District of California, ss:

THE PRESIDENT OF THE UNITED STATES

To the Marshal of the United States for the Southern District of California—GREETING:

Whereas, at the January, 1930 Term of the District Court of the United States of America for the Southern District of California, Southern
(Seal) Division, held at the Court Room of said Court in the City and County of Los Angeles, in said District, to wit: On the ~~4th~~ 10th day of April ~~May,~~ 1931, A. D. Jimmy Burns (true name James E. Burns) was convicted of the crime of violating section 3, Title II of the National Prohibition Act of October 28, 1919, as amended March 2nd, 1929, transporting 197 cases of intoxicating liquor, etc. com-

mitted on or about the 11th day of May, 1930, near Santa Barbara, County of Santa Barbara, California, and within the jurisdiction of said Court, contrary to the form of the statutes of the United States in such case made and provided, and against the peace and dignity of the said United States.

And Whereas, on the 4th day of May, 1931, A. D. being a day in the said term of said Court, said Jimmy Burns, (true name James E. Burns) was, for said crime of which he stood convicted as aforesaid by the judgment of said Court, ordered to be imprisoned in the Los Angeles Co. Jail for one year on the first count; pay fine of $2000 on the second count and stand committed to Los Angeles County Jail till paid; and on third count be imprisoned in the United States Penitentiary at McNeil Island, Washington, for the term and period of five years, and that sentence on 3rd count be suspended during such time as the defendant reports in writing quarterly, every three months, beginning with May 4, 1931, to probation officer of this court, during which time he entirely refrain from any violation of any law, etc. and in case of violation of any terms of probation the defendant to be brought before the court and sentenced, probation being for five years; and whereas under date of January 21st, 1932, the court having found that defendant has violated terms of probation, he is sentenced to said Penitentiary for five years on the third count as aforesaid.

Now this is to Command you, the said Marshal, to take and keep and safely deliver the said Jimmy Burns (true name James E. Burns) into the custody of the Keeper and Warden, or other officer in charge of said penitentiary forthwith.

And this is to Command you, the said Keeper and Warden and other officers in charge of the said penitentiary to receive from the United States Marshal of said Southern District of California, the said Jimmy Burns (true name James E. Burns) convicted and sentenced as aforesaid, and, him, the said defendant safely to keep and detain in said penitentiary for the term and period of five years on the third count, his probation being cancelled. Herein fail not.

Witness the Honorable Geo. Cosgrave, judge of the District Court of the United States for the Southern District of California, and the seal thereof, at Los Angeles, in said District, on the 21st day of January, A. D. 1932.

R. S. Zimmerman,
Clerk of said District Court.

By Francis E. Cross
Frances E. Cross
Deputy Clerk.

The within Warrant of Commitment was received by me on the 21st day of Jan, 1932, and is returned executed this 23rd day of Jan, 1932

A. C. Sittel
U. S. Marshal.

By Charles E. Rice
Deputy.

[Endorsed]: Criminal Docket No. 29027 No. 10096 C. Crim. In the District Court of the United States, Southern District of California Central Division. The United States vs. James E. Burns (Jimmy Burns) Final Commitment Five years in McNeil Island Penitentiary on the third count. Filed Feb 3-1932 R. S. Zimmerman, Clerk By Theodore Hocke Deputy Clerk

At a stated term, to wit: The SEPTEMBER Term, A. D. 1931, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday the 21st day of January in the year of our Lord one thousand nine hundred and thirty-two

Present:

The Honorable GEORGE COSGRAVE, District Judge.

United States of America, Plaintiff,)
)
vs.) No. 10096-C-Crim
)
Jimmy Burns, Defendant.)

This cause coming on for hearing on revocation of probation as to Jimmy Burns, who is present in court, on the third count of the indictment; Gwyn Redwine, Esq., appearing for the Government; Elmer L. Kincaid and Samuel Rappaport, from Triay's office, being present alternating as official stenographic reporters of the testimony and proceedings; Gwyn Redwine, Esq., makes a statement relative to revoking probation, following which Jimmy Burns makes a statement in his own behalf; and states that he desires Otto Christensen, Esq., to represent him; whereupon, at 2:08 p. m. a recess is declared until 3:00 p. m. today, or earlier, to allow Otto Christensen, Esq., to represent him.

Now, at the hour of 3:00 o'clock p. m. court reconvenes, and all being present as before, including Otto Christensen, Esq., as counsel for defendant who now makes a statement and requests additional time within which to investigate the facts, which said request of Otto Christensen, Esq., for continuance is denied, objection noted.

A. P. Rumburg is called and sworn and testifies for the Government on direct examination conducted by Gwyn Redwine, Esq., and the following exhibit is offered and admitted in evidence, to-wit:

Govt. Ex. 1—Memorandum dated August 19, 1931, indicating time defendant Jimmie Burns was absent from Los Angeles County Jail.

following which witness Rumburg is cross-examined by Otto Christensen, Esq; and thereupon is examined by the Court.

R. S. Zimmerman, Clerk, is called and sworn and testifies for the Government on direct examination conducted by Gwyn Redwine, Esq.

James J. Doolen is called and sworn and testifies for the Government on direct examination conducted by Gwyn Redwine, Esq.; following which he testifies on cross-examination conducted by Otto Christensen, Esq.; whereupon he is examined by the Court. At 3:46 o'clock p. m. witness Doolen testifies on redirect-examination conducted by Gwyn Redwine, Esq., followed by recross-examination conducted by Otto Christensen, Esq.; and, thereafter, the Government rests.

James E. Burns, defendant, is called and sworn and testifies for himself on direct examination conducted by Otto Christensen, Esq.; following which he testifies on cross-examination conducted by Gwyn Redwine, Esq., and thereafter, on redirect-examination conducted by Otto Christensen. The Court makes a statement, probation is cancelled, and it is ordered that forthwith the United States Marshal execute the sentence originally pronounced, that being confinement in Federal Penitentiary at McNeil Island, Washington, for a term and period of five years,

on James E. Burns; and, it is further ordered that Dr. Anthony examine defendant Jimmy Burns to ascertain whether or not the transfer of him to McNeil Island Penitentiary on this evenings train will jeopardise his health or cause serious injury to him, and in the event that the decision or opinion of the physician is that such a trip would jeopardise his health, the Marshal's office is authorized not to transport him on this evenings train. Otto Christensen, Esq., notes an exception to the Court's order.

At the hour of 4:15 o'clock p. m. the Court declares a recess without date.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	No. 10096-C
	)	
vs.	)	BILL OF
	)	EXCEPTIONS
JIMMIE BURNS,	)	
	)	
Defendant.	)	

BE IT REMEMBERED, that heretofore, on, to-wit, the 10th day of April, 1931, before the Honorable George Cosgrave. Judge of the United States District Court in and for said district, the defendant withdrew his plea of not guilty to the indictment and entered a plea of guilty to each of Counts 1, 2 and 3, and that thereupon the Court continued the cause for sentence to April 30, 1931, and

thereafter, on to-wit, the 30th day of April, 1931, the Court continued said cause for sentence until the 4th day of May, 1931; that thereafter on, to-wit, the 4th day of May, 1931, said cause coming before the Court, the Honorable George Cosgrave presiding, for pronouncement of sentence upon the defendant Jimmie Burns, S. W. McNabb, United States Attorney, and J. George Ohannesian, Assistant United States Attorney, appearing as counsel for the government, and the defendant being present in Court with his attorney, Ames Peterson, Esq.; a statement of facts of the case was made by S. W. McNabb, Esq., whereupon the Court pronounced sentence upon the defendant Jimmie Burns for the "crime of which he stands convicted, viz: violation of Sections 65 and 37 of the Federal Penal Code; and it is the judgment of the court that said defendant be imprisoned in the Los Angeles County Jail for the term and period of one year on the first count, to pay a fine unto the United States of America in the sum of $2000.00 on the second count, and stand committed to the Los Angeles County Jail until paid, and that the said defendant be imprisoned in the United States Penitentiary at McNeil Island, State of Washington, for the period of five years on the third count of the indictment; execution of said sentence and imprisonment on the third count is suspended during such time as the defendant reports regularly every three months in writing, beginning with this date, to the Federal Probation Officer of this court; during which time he entirely refrains from any violation of any law, with the possible exception of parking and traffic ordinances, and in all respects conduct himself as a law-abiding citizen. In the case of violation of the terms of probation the defendant will be brought

before the Court and sentenced. Probation is granted for a period of five years."

BE IT REMEMBERED, that thereafter on, to-wit, the 21st day of January, 1932, at the hour of 2 o'clock P. M., before the Honorable George Consgrave, Judge of the United States District Court in and for said district, the defendant appearing in court unaccompanied by counsel, the United States of America being represented by Gwynn Redwine, Esq., Asistant United States Attorney, whereupon the following proceedings were had, and the following testimony taken, that is to say:

"MR. REDWINE: If the Court please, in the case of the United States vs. Jimmy Burns, No. 10096-C, there has been an investigation conducted by the Department of Justice relative to violation of probation on the part of the defendant in that case, Jimmie Burns.

Now, pursuant to your Honor's order, I have had the Marshal's office bring Jimmie Burns to the court room, and at the present time he is present in court. * * * * He notified me that he desired to have Mr. Otto Christensen, an attorney at law, who is qualified to practice in the Federal Court, present, and I have sent word to Mr. Christensen. * * * *

THE COURT: We will have a recess until Mr. Christensen's arrival, but not beyond 3 o'clock, in any event; unless he is present at that time, you can make arrangements to procure somebody else."

A recess until the arrival of counsel or until 3 o'clock (Recess) (After recess)

"MR. REDWINE: I notice, your Honor, that Mr. Otto Christensen is in the court room. I presume he de-

sires to be entered in the record as representing the defendant in this matter.

MR. CHRISTENSEN: I might say, your Honor, that I haven't had any occasion, but probably about 120 seconds, to talk to Mr. Burns, and all I know is that there is a proceeding pending here with reference to a judgment and sentence of this court, wherein this court placed him on probation for the period of the sentence that was originally imposed, and that an effort is being made now to present facts to the Court, or the desire is to present facts to the Court, which may lead to a revocation of that order of your Honor's granting him probation, or rather suspending the sentence for the period of the original sentence and judgment. Now, as to what the issues are that are involved, I don't know. I haven't had any opportunity to discuss with Mr. Burns, or, for that matter, arrange for my representation of him, as counsel. He has expressed that desire, and when a thing comes so suddenly as this, one doesn't have that opportunity. I do feel, however, that when a man is placed in a situation like he is, with this motion pending before the Court, that it is the duty of an officer of this court to respond, regardless of whether he is retained in the matter or not. If he desires me to represent him, I propose to do so. Of course, I recognize, your Honor, that there is a concomitant duty here upon the part of the court, in the interests of the prosecution, the people, and, on the other hand, the rights of this prisoner, who is brought before this court, to allow him to try to vindicate himself of any acts which might be alleged to be a violation of the Court's order, because it is such a serious matter that it virtually means an extended sentence of 4 years; and under those

circumstances, when there is such a situation that presents such grave aspects, why, we shouldn't be hasty in the matter, and I would like to have some opportunity to inquire into the situation. I haven't even seen the files to determine just what the sentence is, or as to whether or not the sentence, as of record, is one where the order of the Court has yet commenced to feed—in other words, probation has not yet commenced—and there may be some technical considerations; it seems to me that, where a man's liberty is at stake, under these circumstances for an additional period of 4 years, that we ought to have some opportunity.

THE COURT: You want additional time, in other words, is that the idea?

Mr. CHRISTENSEN: Yes, your Honor.

THE COURT: Very well. Of course, this matter is entirely informal.

MR. CHRISTENSEN: Oh, I understand that.

THE COURT: There is no procedure laid down for it. The newspapers for several days have been full of accounts reflecting, in a most serious measure and degree, upon this defendant who pleaded guilty to certain offenses, was given a jail sentence and also sentenced to a term in the Federal Penitentiary, which was suspended during the period of his good behavior. This is an extremely simple matter that the Court has before it. The question is whether he has violated the terms of his probation. The matter was brought to the attention of the Court by the United States attorney's office, whereupon the Court ordered that the defendant be brought before the court. We are here now to investigate. I don't feel that it is a matter in the nature of a trial, and, inasmuch as the

(Testimony of A. P. Rumburg)

matter has been brewing for several days, and the defendant himself might have anticipated such a proceeding, I see no harm in going ahead with the proceedings necessary to determine the question before the Court. Therefore, the request for a continuance is denied."

Objection was noted to the proceedings, as follows:

"MR. CHRISTENSEN: On the grounds, and, anticipating what the sentence was, and upon the statement of your Honor that the penitentiary sentence was suspended during the period of his good behavior, and that a jail sentence was imposed, that the order of the Court, as far as probation is concerned, would not feed upon the defendant while he was in actual custody of the Government or the United States Marshal, since the jailer is simply the agent of the Government in keeping him incarcerated."

Which objection was then and there overruled by the court, to which ruling of the court the defendant then and there took an exception.

A. P. RUMBURG,

called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

That he is a special agent of the United States Department of Justice, Bureau of Prohibition, and knows the defendant Jimmie Burns; that he saw the defendant Jimmie Burns on August 18th, 1931; that on or about August 1st, 1931 he received information that Mr. Burns was permitted to leave the County Jail for a full day at a time; that he was absent all day; that these rumors persisted and he (Rumburg) caused an investigation to be

(Testimony of A. P. Rumburg)

made of the County Jail records, to determine the date of the absences and the length of time that he was absent from the jail.

"Q Have you that record of the Los Angeles county jail, with you?

A I have a copy of the record, yes. That was taken from the record (indicating document.)

Q Is this a copy of a record which was submitted by your office to our office, including the results of your investigations?

A Yes, sir, this is a copy of the report."

Whereupon the Government's Exhibit No. 1, for identification, was, over the objection above stated, received in evidence, to which ruling of the court the defendant then and there duly took an exception.

Said government's Exhibit No. 1 is the first page of a copy of a report bearing the typewritten signature of "J. W. Ghoslin, Special Agent, Bureau of Prohibition", which said report was attached to a letter of the witness addressed to the United States Attorney; said Exhibit No. 1 is in words and figures as follows:

No. 10,096-C
Jimmy Burns
Gov. Exhibit No. 1
Filed 1/21/1932
R. S. ZIMMERMAN, Clerk
By Francis E. Cross
Deputy Clerk

"Los Angeles, California
August 19, 1931

MEMORANDUM

During the past ninety days this office has been subjected to considerable criticism and the service in general ridiculed because of the alleged weekly visits of Jimmie

(Testimony of A. P. Rumburg)

Burns to his home in Beverly Hills. We have been told repeatedly that Burns is allowed to go home and spend entire days and nights there, during which time he entertains friends and puts on liquor parties. In order to either confirm or disapprove these continued reports, I checked the gate book of the Los Angeles County Jail on the 18th instant and find that Burns has been absent from the jail in custody of a Deputy U. S. Marshal as follows:

DATE	AUTHORITY	TIME OUT	CUSTODY OF	TIME IN
May 10	Judge James	8:30 A. M.	Lessner	9.06 P. M.
14	"	9:25 A. M.	"	4:50 P. M.
19	"	9:20 A. M.	"	5:10 P. M.
22	"	9:30 A. M.	"	4:55 P. M.
29	"	1:02 P. M.	"	5:00 P. M.
June 16	"	9:20 A. M.	Jones	C O
20	"	9:35 A. M.	Lessner	5:35 P. M.
26	"	10:30 A. M.	"	4:30 P. M.
30	"	10:35 A. M.	"	C O
July 12	"	9:43 A. M.	"	6:00 P. M.
17	"	9:40 A. M.	"	5:30 P. M.
23	"	9:30 A. M.	"	6:18 P. M.
Aug. 8	"	9:45 A. M.	"	6:30 P. M.
13	"	9:15 A. M.	"	6:30 P. M.
18	"	9:20 A. M.	"	6:30 P. M.

(Testimony of A. P. Rumburg)

The "CO's" on the above list indicate that Burns returned some time after the count of prisoners at 6:00 P. M. and it is apparent that the records indicating a return after 6:00 P. M. cannot be relied upon, as on the 18th instant the records indicate that he returned at 6:30 P. M., while as a matter of fact Special Agent Rumburg and myself were visiting with him at his home in Beverly Hills at 6:20 P. M. and it would require approximately forty-five minutes to drive from his home to the jail.

At the time I checked the gate book, I was under the impression that some individual was impersonating Deputy Marshal Lessner, and this impression was strengthened when upon inquiry at the Marshal's office yesterday afternoon. I learned that Mr. Lessner was in San Pedro serving papers."

The witness further testified that he didn't know what the abbreviation "C. O." stood for, "except that it is after 6:30 P. M., when they don't have the regular recorder on the books—it seems as though the time is indefinite, in other words." The witness further testified that on August 18th, 1931, at 6 o'clock P. M., in company with another agent, he visited Mr. Burns' residence at 517 North Palm Drive, and after ascertaining that Mr. Lessner was there, and on knocking at the door, asked for Mr. Lessner; that thereupon a young lady came to the door, of whom they asked for Mr. Lessner; that the young lady disappeared for a minute and Mr. Burns came to the door and invited the witness and the accompanying agent in the house; that Mr. Burns was without a coat or hat and had on bedroom slippers; that they "had previously ascertained by telephone that Mr. Lessner was there, al-

(Testimony of A. P. Rumburg)

though he was in the bathroom"; that it was about 5:45 when the witness telephoned; that he talked to Mr. Burns on the telephone at that time; that it was 6 o'clock when they arrived at Mr. Burns' place and that Mr. Lessner was not there at that time; that after they had been inside about ten minutes Mr. Lessner came in; that Mr. Lessner had his coat and hat on and brought in a couple of packages of cigarettes".

"Q Were you offered anything to drink when you were at Mr. Burns' place?

A I don't recall. I think we were. Yes.

"Q Now, did you check the records of the clerk of this court for the purpose of determining whether or not Judge James had actually authorized the removal of Jimmy Burns from the county jail on the dates mentioned in Government's Exhibit No. 1?

MR. CHRISTENSEN: Just a moment. That is objected to, your Honor, the record of the court will speak on that subject.

THE COURT: That is true, of course, but if the marshal made a check-up of the records, I will listen to it, what he has to say about it. It would require an examination of the entire record, or absence of record, of course, to show, and we haven't time to go into such a proceeding as that, nor do I believe that this proceeding is designed for that purpose.

MR. CHRISTENSEN: Well, I would like to have an opportunity of checking the record, and it won't take long, so I can offer the order, if one is in existence.

MR. REDWINE: I can call Mr. Zimmerman who made the check.

(Testimony of A. P. Rumburg)

Q Did you make an investigation to ascertain whether or not Judge James had actually authorized the release of Jimmy Burns from jail on the dates mentioned in this Government's Exhibit 1?

A Yes, we did.

Q What investigation did you conduct in that regard?

A By checking the records, and one of the agents talked to Judge James, personally.

Q And what did you ascertain in that regard?

A I ascertained that permission had been granted for him to go to a dentist. That was back in May, I believe, but no dates mentioned."

That in May, Judge James had authorized his release for the purpose of taking him to the dentist.

On cross-examination, the witness testified that he didn't see Judge James personally, but at his request one of the agents made the contact with Judge James and that what he has testified to in reference to Judge James was what his agent told him was the result of the interview with Judge James; that he personally interviewed Mr. Lessner, who told him that he had an order for the times that he took Mr. Burns from the jail, and that Mr. Lessner exhibited the order to him.

"Q And that was an order that authorized him leaving the jail, a general order, to be taken to the dentist?

A Yes, it was written in long-hand, just two or three lines.

Q And was that signed by Judge James?

A Evidently.

(Testimony of A. P. Rumburg)

Q And was that a general order permitting him to take him to the dentist, without specifying any specific date?

A I don't recall the exact wording of the order. It was dated May 8th, as I recall it.

Q And did that order contain language to the effect that Jimmy Burns might be taken to the dentist for treatments?

A For the purpose of visiting the dentist, I think it was something like that."

The witness testified that he couldn't say as to whether the order was limited to a single visit or whether it was for general treatment.

The witness further testified that when he saw Mr. Burns and Mr. Lessner at Mr. Burns' house on August 18th that he and his agent left before Mr. Lessner and Mr. Burns; that at that time Mr. Lessner did say how he happened to be with Mr. Burns; that Mr. Lessner exhibited "this order of Judge James'—this order that I described before—as his authority. He said that Mr. Burns had been to the dentist on occasions since the order was written."

"Q And that satisfied you that he was legally in custody of the United States marshal?

A Well, I don't know whether my conclusions—

THE COURT: That would be entirely an immaterial matter and a conclusion of the witness.

Q BY MR. CHRISTENSEN: Let me ask you this question—

THE COURT: One moment, please. This deputy that you mentioned was dismissed shortly afterwards, wasn't he?

(Testimony of A. P. Rumburg)

THE WITNESS: Yes, sir."

Further, upon the court's examination, the witness testified:

"Q Dismissed for his connection with this enterprise, in this matter?

A That is true, so I heard.

Q The defendant was, did you say, in slippers?

A Yes, sir.

Q Out at his residence?

A Yes, sir.

Q. And in custody of the United States marshal?

A Not at the time I arrived, no, sir.

Q That is what I mean. He came later?

A Yes, sir.

Q Was any explanation given to you by anybody of that situation?

A Well, yes, that he was supposed to still be in the bathroom, after we arrived.

Q He was supposed to still be in the bathroom?

A Yes, sir.

THE COURT: Well, this is the first time we have heard of a bathroom in connection with this matter. Where did that come in?

A When we called Mr. Burns at 5:45, we ascertained that Mr. Lessner was there, but he was in the bathroom and couldn't come to the telephone.

Q You say you ascertained; you mean that is what you were told by someone answering the telephone?

A That is what I was told by Mr. Burns over the telephone. Upon arriving there at 6 o'clock, Mr. Lessner wasn't there, and we were told by Mr. Burns that

(Testimony of R. S. Zimmerman)

he was in the bathroom, and would be out shortly. After 10 minutes he came in, apparently through a back door, with his hat and coat on. He had got the cigarettes.

THE COURT: That is all. That is enough.

MR. CHRISTENSEN: Shall I continue, your Honor?

THE COURT: Wait a minute please. We are not conducting a trial. That is sufficient. Leave the stand (addressing the witness.)

MR. CHRISTENSEN: Your Honor must be aware of the fact that I am here and know nothing about the facts and haven't searched them out.

THE COURT: Just a moment, Mr. Christensen. When the court desires argument it will ask for it. Now let's get along here peaceably, and I don't care for argument at all. That is sufficient. Nothing further.

MR. CHRISTENSEN: I am here as the next friend of the Court and am trying to get at the facts.

THE COURT: Very well, if you insist on disregarding the Court's suggestions, of course the Court will take what steps it deems necessary. Proceed.

MR. CHRISTENSEN: With all due deference, your Honor, I made those remarks. Note an exception to the lack of permission to further examine, your Honor.

R. S. ZIMMERMAN,

called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

"MR. REDWINE: Mr. Zimmerman is clerk of the court for the Southern District of California.

THE COURT: What do you propose to show by Mr. Zimmerman?

(Testimony of R. S. Zimmerman)

MR. REDWINE: To show no orders have been entered authorizing the release of Jimmy Burns from the county jail.

THE COURT: Well, it wouldn't necessarily follow, I think, that an order hadn't been signed.

MR. REDWINE: It would show that orders of those particular days hadn't been signed, your Honor.

THE COURT: You mean not filed?

MR. REDWINE: I mean not filed.

THE COURT: Very well.

Q. In the usual course of procedure in connection with your office, Mr. Zimmerman, when a prisoner is authorized to be released from the Los Angeles County Jail, for any purpose, does that fact appear on your records?

A It does.

Q Do your records reflect, in the case against Jimmy Burns, being case No. 10098-J, whether or not any authorization was granted to release Jimmy Burns from the county jail or to take him from the county jail in the custody of the United States marshal's office, to the dentist or any other place?

A It doesn't so disclose.

Q In other words your records do not disclose any authority as having been granted by Judge James, or any other person?

A That is right.

Q BY MR. CHRISTENSEN:

Have you examined the file, Mr. Zimmerman, to see whether there was actually in the file any orders, or have you just examined your records there to see whether or not it had been docketed on the order?

(Testimony of James J. Doolan)

A I have examined the file also.

Q Did Mr. Lessner ever state to you or exhibit an order that he purported to have from Judge James in this matter?

A He never did.

Q Did you ever talk with Judge James about it?

A I never did."

JAMES J. DOOLAN,

called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

That he was then a prisoner in the county jail in the custody of county authorities; that he had not been sentenced as yet; that he had seen the defendant Burns in the county jail; that he had one conversation with Mr. Burns; that this conversation was had with Mr. Burns on Wednesday of the *proceeding* week.

"Q Will you relate that conversation, please?

A Yes. About 3:50 P. M. on Wednesday afternoon he called me to the grill, up there in the hospital, with a paper to sign, and a picture to sign.

Q And do you know the contents of that paper that Mr. Burns brought up to you to sign? Did you read it?

A Yes, I did. It was a statement contradicting the first statement I made in connection with Zeke Caress kidnapping case.

Q Involving one Sheldon?

A It did.

Q Did that paper that Mr. Burns wanted you to sign contain any false statements?

A It did.

(Testimony of James J. Doolan)

Q Did you sign the paper?

A I did.

Q And Mr. Burns, or the one that delivered that paper to you, asked you to sign it, did he?

A He handed it to me through the grill.

Q Did you have any other conversation with Mr. Burns?

A No, just that one time.

Q What did Mr. Burns say at the time that he handed you that paper for you to sign?

A Well, he just told me I had done a terrible thing and I could right a great wrong if I did sign that paper.

Q What else did he say?

A Just a general conversation—it didn't last over two or three minutes.

Q At that time you were intending to appear for the State as a witness, were you, in the case?

A I was."

On cross-examination, the witness Doolan testified:

That he was a proposed witness in a case pending in the state court; that he had been in custody for fifty-five days in the county jail; that he had not been convicted of a felony and was not then on parole from another sentence; that he was confined in the county jail; that his cell was known as Block 14-H-2; that 14-H-2 is one of the hospital wards in the county jail; that he did not occupy a cell, but was confined to this hospital ward, in which there were about eighteen or twenty prisoners; that he had been in this ward for nine days; that Mr. Burns was not one of the prisoners in that ward.

(Testimony of James J. Doolan)

"Q And had you seen Mr. Burns before and talked with him, or not, or was this the first time?

A He used to bring me chow in there—he came three times a day, and I only spoke to the man one time before when he came into the ward one evening, and I give him my hand in a bridge game, and that was all. I never had conversation with the man before.

Q In other words the only thing you had to do with Mr. Burns was in connection with giving him your hand in a bridge game?

A Yes, I just handed the cards to him.

Q And there was no discussion about this matter at all?

A No.

Q Until this day, Wednesday, when this paper was given?

A That is the only time.

Q Had you given any information to anybody else about this matter?

A In what way?

Q Well, I mean as to these things that were contained in that statement that you signed?

A Well, the young fellow there saw me first.

The witness further testified: That he signed the papers because "I was in a tough spot—at least I thought I was.

Q And when Burns came to this place, was he delivering food to the place? A He was.

Q And he was outside of the ward, outside of the door?

(Testimony of James J. Doolan)

A Yes, the door. He handed it through the grill door.

Q So he delivered the food to the ward and then handed you these papers?

A He delivered it, and when he had delivered it to the other wards he came back; after he got through delivering it, I suppose that is what he had done.

Q You think that is what he did?

A Yes, sir.

Q And when he came there the first time, did he have the paper and the picture, or was it the second time?

A No, the first time it was in the ward when he come in with the wagon and I hadn't signed it then, and somehow or other the fellow that had given it to me got it back to him and give it to him, or something of that sort. He didn't give it to me the first time.

Q I see. Somebody else had given it to you?

A Yes, I hadn't signed it yet."

That at the time Mr. Burns came with his wagon with food for the ward in which the witness was confined Mr. Burns didn't have the statement and picture; that he saw Mr. Burns some ten minutes later, five or ten minutes; that Mr. Burns was in the passageway outside of the ward; in other words, the bars were between the passageway and the ward so that Mr. Burns could not get in the ward; that the picture and statement was just handed in through the grill.

"Q. In through the grill. And what did you say to him when he handed it to you?

A Well, I don't recall anything that I said at all.

Q And did he leave immediately?

(Testimony of James J. Doolan)

A Just to get a pen and ink.

Q I see. And did he say anything to you at that time?

A He said I done a terrible wrong and I could right the grdat wrong if I would sign that, and we could all be out on the street.

Q That was all that was said at the time?

A That I recall.

Q And you haven't discussed this matter before or since with him, have you?

A I have not.

Q Now you say there were eighteen men in that ward. Was there anybody near you at the time?

A Yes, Moe Factor.

Q Anybody else?

A No, no one close by. All the other fellows were on the ward but I don't remember anyone that would remember the incident."

The witness further testified that when he got this paper from Mr. Burns, Moe Factor and the witness went into the bathroom where he signed it; that Mr. Burns was outside when he went into the bathroom; that only he and Moe Factor went into the bathroom.

"Q Was anything said between you and Moe Factor from the time you got the paper from Burns and went into the bathroom?

A Only after I had signed it I said, 'Do you want me to dry it with your handkerchief?' and he said, 'No, you are not supposed to put your hand on it. I will take care of it from here on out.' That is all that was said.

(Testimony of James J. Doolan)

Q You didn't discuss the details of it, didn't make any expression at all as you walked into the bathroom and back again?

A None at all.

Q Have you ever discussed it with anyone else up there in your tank?

A No one."

On examination by the court, the witness testified that Moe Factor had urged him to sign the document; that the first time the document was handed to him he told Factor he wanted time to think it over; that when it was handed to him the first time Factor read it over to him, because the witness had bad eyes and the light was bad; that fifteen or twenty minutes later the document was handed to him a second time; that Mr. Burns brought it on the second occasion with a pen and ink to the grill.

Further examination by the Court:

"Q And handed it through?

A He gave the pen and ink to Moe Factor.

Q Yes. Well, it was Mr. Burns who handed to you in the first place, wasn't it?

A No, the second time.

Q Well, who handed it to you in the first place?

A Moe Factor.

Q Well, he didn't hand it through the grill?

A No, Moe had it in his possession the first time.

Q Oh, I see, Moe had it in his possession?

A And he had given it back to Jimmy, I suppose, I don't know.

Q And you handed it back to Moe after being unable to read it?

(Testimony of James J. Doolan)

A Yes, and he read it off to me.

Q And then who gave it to you again?

A. Mr Burns.

Q Yes, but how did Mr. Burns get it from Moe?

A That is something I don't know.

Q You didn't see the passage of it.

A No. I didn't see that.

Q Well, at any rate you don't know where Moe went?

A No, I don't; I couldn't truthfully say.

Q And after Moe had induced you to sign it, the next time you say it was when Mr. Burns handed it through the grill?

A Yes, sir.

Q BY MR. CHRISTENSEN: Now, the first time that you got there—

THE COURT: I think that is clearly enough, Mr. Christensen.

MR. CHRISTENSEN: I wanted to know—

THE COURT: I know. I was a little bit confused on it, myself, but the paper, or a paper at least, was first presented by—that he failed to sign it or refused to sign it, or did not sign it on account of lack of light; later it was the same paper that was put through the grill by the defendant.

Q BY MR. CHRISTENSEN: Now, when Mr. Mose Factor gave you this paper you did not read it because you had no glasses, he read it to you; When he got through reading it to you was there any discussion?

A Yes. I told him that I would like to have it for a day or two. He said, 'You are not supposed to do it

(Testimony of James J. Doolan)

in that way.' He said, 'Sign it right now. I have got to take it now.'

Q In other words, you wanted these matters in there—

THE COURT: Well, that is enough. Leave the stand.

MR. CHRISTENSEN: I want to ask him if he discussed it with Mr. Mose Factor.

THE COURT: You misunderstand, of course, what we are here for is to determine the attitude and the part that Mr. Burns took in that, and nothing else. That is sufficient.

MR. CHRISTENSEN: May I submit, just for the record, that I would like to—

THE COURT: Yes, you can take an exception. Go on.

MR. CHRISTENSEN: I mean, may I be permitted to make a statement of what I was going to prove?

THE COURT: I do not care for that.

MR. CHRISTENSEN: Does your Honor recall that he testified that the things in there were read over and so forth with a man, that they discussed that with Mr. Mose Factor on that subject before—

THE COURT: Remember this: We are not here to discuss the merits of any case at all. We are here to find out whether there are grounds to believe that this defendant did anything of this sort without permission, gave the prisoner statement, whether that is true or untrue. It does not make much difference to me. That is enough. That is all.

On redirect examination by the plaintiff, the witness testified:

(Testimony of James E. Burns.)

That the picture was one of Ralph Sheldon; that he was expected to testify in a case against Ralph Sheldon.

"Q That was an affidavit or a statement that was prepared that was false that had Ralph Sheldon's picture, is that right?

A Yes, it was.

MR. CHRISTENSEN: May I ask a question on a new subject, your Honor?

Q Isn't it a fact, Mr. Doolan, that you have identified before some of the authorities in the county jail the man that brought you the pen and ink was a man by the name of Smith, or some man other than Mr. Burns, at the time you signed that statement?

A Mr. Smith that come to the couch and got the pen and ink out of our cell, I mean out of the ward, but Mr. Burns was one who put it through the door to Mose Factor.

Q In other words—

THE COURT: That is enough."

The plaintiff rests.

JAMES E. BURNS,

the defendant herein, called as a witness in his own behalf, having been first duly sworn, testified as follows:

That he was the subject of the present inquiry and has been serving a jail sentence in the county jail; that he has served eight and one-half months of his county jail sentence and practically the whole period of that time has been a trusty.

"Q Do you know anything about the custom of the jail over there as to the demeanor and conduct of prison-

(Testimony of James E. Burns.)

ers in connection with the designation as trusties?

A Well—

Q Whether it is by merit or otherwise?

A Well, it is by merit. I would want to correct that first statement. I was in there about 30 days before I became a trusty. Then they made me trusty, and I have been ever since.

Q And is that given to prisoners, that is what I want to know, do you know what the custom is as to behavior?

A Yes, sir."

The witness further testified there were about 1800 prisoners in the county jail of which number about 100 were trusties.

"THE COURT: The court will take judicial notice that a trusty—I have always heard it called 'trusty', you pronounce it, you call it 'trusty',—is one in whom jailers have some confidence, so you can leave that matter."

The witness further testified that last spring he did have trouble or difficulty with his teeth; that he had a lot of bad teeth; that there were no facilities in the jail for doing dental work and that he was taken out to see a dentist.

"Q Do you know how you happened to be taken out of the jail h use?

A Why, if I don't remember wrong, I think that Ames Peterson, I think that was he who it was that went to Judge James and explained the situation that my teeth were bad, that he would like to have the court order me to go to a dentist to have them repaired. And Judge James, he got it."

(Testimony of James E. Burns.)

That at the times he was out of the county jail he went to the dentist's office; that he saw the orders; that there was more than one order issued; that he didn't remember the exact wording of them; that one Jones had an order to take him out also and he guessed that it was for only once, and that Lessner had the other order.

"Q Do you recall whether those orders were for treatments or for specific occasions.

A For treatments."

That he had a lot of work done and as a matter of fact he was not finished with it yet.

"Q And actually what—would he give you treatments?

A Oh, yes, sir. Sure; you can look at my mouth and see that work that is unfinished right now.

Q How long would he work on your mouth each time you were there?

A Oh, it is according as to how much I could stand; an hour or an hour and a half; sometimes more. I would rest a little while; he would work more.

Q What was the name of your dentist?

A It has been so long since I have been there, I can't really recollect what is his name.

Q Where is his office at?

A Hollywood Boulevard and Cherokee Street."

That when he went to this dentist and left the county jail that he would go under the assumption that he could legally do so under a court order; that he absolutely did not pay anybody to get out or perform any favors for him while he was out; that he never rewarded Mr. Jones

(Testimony of James E. Burns.)

or Mr. Lessner on any of these occasions, but might have given them a cigar.

Q Now, Mr. Burns, getting down to the testimony of Mr. Doolan here, what were your duties in the county jail on the day that he testified to?

THE COURT: The only thing—I do not care to hear on that question, Mr. Christensen, I am interested to know as to whether or not this witness did what it is claimed. We must hurry along.

MR. CHRISTENSEN: All right.

Q In a narrative way relate what you know about this incident.

A On Friday night at 7 o'clock, it is a week ago this coming Friday, I was called out of my tank where I was confined and taken to the district attorney, Buron Fitts, and questioned—

THE COURT: Well, never mind that."

Upon the court's examination, the witness testified as follows:

"Q You heard this witness's testimony?

A Yes, sir.

Q Did you do that?

A No, sir. I could prove that I didn't.

Q You never handed him any paper at all?

A No, sir; absolutely not; no, sir.

Q His statement is entirely untrue that you handed him a paper, or procured pen and ink?

A Absolutely.

Q You never saw such paper?

A Never heard of it or saw it.

Q You have no knowledge of it?

(Testimony of James E. Burns.)

A No knowledge of it whatsoever, your Honor. As a matter of fact, there has never been anybody ever showed this statement to verify that there is such a statement."

The witness further testified, upon examination by counsel, that on the particular day and hour he was carrying a tray along a corridor in a wagon serving food; that these were his duties in the jail.

"Q Did you ever have any discussion or ever talk to this man Doolan?

A He says that I did once here but I don't remember.

Q But that incident you do not recall?

A. No, sir, there was no such incident."

On cross-examination by the plaintiff, the witness testified as follows:

"I could look in a phone book and tell you in a moment the name of the dentist"; that he did not go to the dentist each and every time that he went out of jail; "I would call him and if he could take me, if he wasn't, his appointments were not all made for that day, he would take me; it was only a couple of times that I didn't—just a few times."

"Q BY MR. REDWINE: Now, the record shows on May 30th, you left the jail on May 30th, at 10 o'clock A. M. and did not return until 9:06 P. M. You were not in his office all of that time?

A No, sir, I don't remember the incident, but I don't suppose I was.

Q What did you do?

A Well, I might have had something to eat.

Q What else did you do?

(Testimony of James E. Burns.)

A That is all.

Q. Well, what were you doing until 9:06 P. M. in the evening?

A Well, listening to the radio, something like that.

Q Where were you listening to the radio?

A At my home.

Q How many times did you go to your home when you were really supposed to be going to the dentist?

A Well, I really couldn't tell you, just quite a few times.

Q Most of the time?

A. Pretty near.

Q Did you give Mr. Lessner anything for taking you to your home? A. Absolutely not.

Q Do you know why it was that he should be willing to stay out until 9, and after 6 o'clock at night when he took you down to your home if you didn't give him any remuneration?

A I don't know. I never give him any remuneration.

Q Did you give him any liquor of any kind?

A Absolutely not.

Q Well now, on May 14th, you were taken out of jail at 9:25 A. M. and returned at 4:50 P. M. Were you in the dentist's office all of that time?

A From 10 to 5, that is practically—

MR. *REDWIN*: Yes.

A Well, I might have got to the dentist around noon, and would be there a couple of hours by the time to get back here, it was pretty close to that.

Q Why was it that you didn't call up the dentist's office before you left the jail to see whether you could have an appointment or not?

(Testimony of James E. Burns.)

A You cannot telephone from the jail.

Q What arrangement did you make with Lessner to come over and take you out of the jail and pick you up at the county jail? Did he just say, 'Come on, we will go up to the dentist's office'?

A Well, for instance, if I had a date today with the dentist a week or more, when they would ask him when he could see me again, he would state some date—

Q You knew also—

MR. CHRISTENSEN: Let him finish."

The witness further testified that he was a prisoner in the county jail, knew that the marshal had come to the county jail to take him out of the county jail and that it was the usual thing to get permission to go to the dentist's office; that it was the usual thing with a lot of people.

"Q Why was it that you didn't make an appointment then with the dentist for a particular date?

A For the reason that the marshal was not able to get there and come and get me, because he was doing something else."

The witness then further testified that at the time Mr. Lessner and Mr. Rumburg were at his home on August 18th he was there about an hour and a half and that he had been to the dentist that day; that he didn't remember right then the name of the dentist, but that he could get it in a minute; that the dentist was on the corner of Hollywood Boulevard and Cherokee Street on the second floor of the building; that it was months ago and that the dentist has a very odd name.

(Testimony of James E. Burns.)

"MR. CHRISTENSEN: May I suggest, in the interests of saving time—I intend to bring the dentist in, if I am permitted.

THE WITNESS: If I could get a phone book I could tell you."

The witness further testified that when he was out with Mr. Lessner he went to his home several times; that he did not go to his home every time.

"Q You went practically every time you left the jail, you went to your home sooner or later during the period you were out of the jail?

A No, not every time.

Q You think you during that time would stay out and have supper out very often?

A I had a little bite to eat. If it would be supper, it would be earlier than supper.

Q How did Lessner know when you wanted to leave the jail? Did you send word over there to him?

A I want to explain that if I may, I could explain that in a minute. If, for instance he would take me out today, I would go to the dentist, I would ask the dentist would he be ready for me again, when he would be ready for me again. Well, if he would say, for instance, next Tuesday, then I would say to Mr. Lessner, "well, the dentist can take me next Tuesday." Then, if Mr. Lessner's duties were such that he could take me out, he would do so. If not, I would have to stay there. Consequently, it was quite of a jumbled up affair in keeping our affairs with the dentist.

Q When you left the jail and didn't go to the dentist's office were you and Lessner riding around or were

(Testimony of James E. Burns.)

you at your house and would Lessner ride around, is that right?

A. Yes."

On redirect examination the witness testified that when he was out he asked to be taken home to get a change of clothes; that usually each time he went to the house he went for a change of linen; that by looking at the telephone book he could give the district attorney the name of the dentist.

"MR. CHRISTENSEN: Your Honor, may I have just a moment? I would like to verify, if the court is interested, the dentist. But if your Honor does not desire that—

The Court: No.

MR. CHRISTENSEN: In addition to that, I would like to clear up the record in reference to these orders because obviously there must be something to it because Mr. Rumburg even say one of those orders. I would like to submit them here in the record if the marshal filed them, so that there will be a docket of them in the usual way. There still might have been filed an order for them to have acted in this matter as far as the marshal is concerned.

"THE COURT: Let me have exhibit 1, Mr. Cross.

MR. CHRISTENSEN: Likewise, on the second issue, I would like to be permitted to bring in such witnesses in the county jail with reference to this testimony, because there are 18 men in that ward, as I understand it, that there are witnesses that can testify as to how that situation took place, and that this defendant had nothing to do with it.

THE COURT: Yes.

MR. CHRISTENSEN: And I would like to call this witness, Mose Factor, and those other witnesses.

THE COURT: No, I am not prepared to have a hearing of this case that will run into the proportions of a criminal trial. That is not what the law contemplates. The defendant in the action has pleaded guilty and was sentenced to a term of 5 years in the Federal Penitentiary. He plead guilty to a separate charge upon which he was sentenced to the county jail for the same term, I do not recall how much. The execution of the penitentiary sentence was suspended during the good behavior of the defendant.

Now, gentlemen, there is enough obviously before this court to show that the spirit of the probation was not in any sense complied with. The idea that one person sentenced to the county jail should over a period of 3 months, a little bit more than 3 months, be taken out for on 15 different occasions from 10 o'clock in the morning until 9 o'clock at night, often-times, that of itself is something that should bring the blush of shame to anybody entrusted with the execution of the law.

That fact alone is contrary entirely to the spirit of probation. Probation supposes penitence, a degree of penitence. I very much regret that any court should be compelled to listen to the failure of performance of the official duty that has been related here today. And my earnest suggestion is that the prisoner and everybody else stand hushed when the instruments of the law are made the convenience, the accommodation, the servants of the defendants.

The probation given to this defendant, granted this defendant is cancelled, nullified, and it is ordered that forthwith the United States marshal execute the sentence originally pronounced, that being confinement in the Federal penitentiary at McNeil's Island, in the State of Washington, for the period of 5 years."

To which rulings and order of the court the defendant then and there duly took an exception; and afterwards, on to-wit, the 25th day of January, 1932, the following order was had and entered of record in said cause by the Honorable George Cosgrave, Judge, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

UNITED STATES OF AMERICA,	)	No. 10096-C
	)	
Plaintiff,	)	ORDER
	)	EXTENDING
vs.	)	TIME FOR
	)	FILING BILL
JIMMIE BURNS,	)	OF
	)	EXCEPTIONS
Defendant.	)	

The hearing on the plaintiff's motion to cancel the probation order heretofore entered herein having come on to be heard on the 21st day of January, 1932, before the Honorable George Cosgrave, Judge of the United States District Court for the Southern District of California, Central Division, and after the hearing thereon, a final order and judgment having been entered cancelling and

nullifying the said probation order, and directing that the United States Marshal immediately and forthwith proceed to execute the sentence originally pronounced herein, said sentence being confinement in the Federal Penitentiary at McNeil Island, in the State of Washington, for the period of five years, and the defendant Jimmie Burns having taken a number of exceptions in the course of said hearing, including an exception to such final order and judgment of the court, and the defendant wishing to obtain a bill of exceptions herein,

For satisfactory reasons appearing to the court, IT IS HEREBY ORDERED, that the term and time for the signing and sealing of the bill of exceptions in connection with said hearing on the cancellation of the probation order herein is hereby extended for the period of 30 days after date hereof, and that whenever so settled and signed, the said bill of exceptions herein shall stand as settled, signed and filed, and made a part of the record herein, as of the 25th day of January, 1932, which said 25th day of January, 1932 is within the original time allowed under the rules of this court for the presenting, signing and filing of said bill of exceptions herein, and the United States shall have ..... days after service of the bill of exceptions in which to submit amendments.

Dated this 25th day of January, 1932.

COSGRAVE

Judge.

For as much as the matters above set forth do not otherwise appear as of record, this defendant tenders this, as his bill of exceptions, which is all of the evidence re-

ceived and proceedings had on said hearing to cancel and nullify the order of probation, and prays that same may be allowed, settled, signed and sealed by the Judge of this Court presiding at said hearing, to-wit, by the said Honorable George Cosgrave, pursuant to the statute in such case made and provided, to be filed and made a part of the record herein, which is done accordingly, this 24th day of February, 1932, which is within the time heretofore granted by the court for the presenting, signing and filing of said bill of exceptions herein.

Geo. Cosgrave
U. S. Dist. Judge

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	No. 10096-C
vs.	)	STIPULATION
JIMMIE BURNS, Defendant.	)	

IT IS HEREBY STIPULATED by and between counsel for the foregoing plaintiff and defendant that the foregoing Bill of Exceptions is a correct bill of ex-

ceptions, and that the same may be settled, signed and filed in the above entitled action.

Dated this 24th day of February, 1932.

SAMUEL W. McNABB, U. S. ATTORNEY
By Harry Graham Balter
Attorney for Plaintiff

Otto Christensen
Attorney for defendant.

[Endorsed]: No. 10096-C In the District Court of the United States Southern District of California Central Division United States of America, Plaintiff vs. Jimmie Burns, Defendant Bill of Exceptions Filed Feb 24 1932 R. S. Zimmerman, Clerk By G J Murphy Deputy Clerk Otto Christensen 1016 Broadway Arcade Bldg. TRinity 8041 Los Angeles, Calif. Attorney for defendant.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
CALIFORNIA CENTRAL DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	No. 10096-C
	)	
vs.	)	
	)	PETITION
JIMMIE BURNS,	)	FOF APPEAL
	)	
Defendant.	)	

To the Honorable George Cosgrave, Judge of the United States District Court:

Now comes Jimmie Burns, also known as James E. Burns, the petitioner herein, by Otto Christensen, his attorney, and respectfully represents and shows unto the court:

That on the 21st day of January, 1932, a final decision or judgment was entered in said court, the Honorable George Cosgrave, Judge thereof, presiding, revoking the probation theretofore granted the petitioner on Count 3 of the indictment on, to-wit, May 4th, 1931, and ordering the execution of the sentence originally pronounced on said Count 3 of the indictment, to-wit, confinement in the federal penitentiary at McNeil Island for the period of five years;

And your petitioner shows that in said decision, judgment and proceedings had in this cause lately pending, certain errors were committed to the prejudice of your petitioner, all of which will more in detail appear in the assignments of error which are filed in this court by your petitioner, together with this petition.

WHEREFORE, your petitioner, the said Jimmie Burns, prays that an appeal may be allowed him from said judgment to the Circuit Court of Appeals of the United States, Ninth Judicial Circuit, and that said appeal may be made a supersedeas upon the filing of a bond to be fixed by the court. Your petitioner further prays that a citation in due form of law may issue requiring the United States of America to be and appear in said United States Circuit Court of Appeals, for the Ninth Circuit, and then and there to make answer to the assignments of error made by your petitioner upon the record in the proceedings in said cause.

And the said petitioner herewith presents his assignments of error in accordance with the rules of the United States Circuit Court of Appeals, and the course and practice in said Honorable Court.

WHEREFORE, your petitioner respectfully prays that an order may be entered in his behalf, authorizing and directing the Clerk of this court to certify the records of the proceedings in said District Court to the Circuit Court of Appeals of the United States, Ninth Judicial Circuit,

as by law provided, to the end that the errors complained of, if any such have occurred, may be duly corrected and full and speedy justice done in the premises.

Dated this 7th day of March, 1932.

Jimmie Burns

By Otto Christensen
Attorney for Petitioner.

[Endorsed]: No. 10096-C In the District Court of the United States Southern District of California Central Division United States of America, Plaintiff vs. Jimmie Burns, Defendant Petition for Appeal Filed Mar 8-1932 R. S. Zimmerman, Clerk By G J Murphy Deputy Clerk Otto Christensen 1016 Broadway Arcade Bldg. TRinity 8041 Los Angeles, Calif. Attorney for Defendant

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
CALIFORNIA CENTRAL DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	No. 10096-C
vs.	)	
	)	
JIMMIE BURNS,	)	
	)	
Defendant.	)	

ASSIGNMENTS OF ERROR

Comes now Jimmie Burns, by Otto Christensen, his attorney, and in connection with his petition for an appeal, says that in the record, proceedings and judgment aforesaid, error has intervened to his prejudice, in the manner and form as follows, to-wit:

I.

The District Court erred in entering its final order on, to-wit, the 21st day of January, 1932, that the probation theretofore granted the defendant on, to-wit, May 4th, 1931, on Count 3 of the indictment, be "cancelled" and "nullified", and in directing the execution of the sentence originally pronounced on said Count 3 of the indictment, to-wit, confinement in the federal penitentiary at McNeil Island, for the period of five years.

The defendant had been confined in the Los Angeles County Jail, in execution of the jail sentence of one year imposed against him on Count 1 of the indictment, from May 4th, 1931 to January 21st, 1932.

The ground of said error is that the probationary period on said count 3 of the indictment had not yet commenced.

II.

The District Court erred in making its final order on, to-wit, January 21st, 1932, revoking the probation theretofore granted the defendant on Count 3 of the indictment on, to-wit, May 4th, 1931, and directing the execution of the penitentiary sentence originally pronounced on said Count 3 of the indictment. The grounds of said error are that the term of court in which the sentence was imposed and the probation granted had expired, and the trial court was without power to revoke the probation of the defendant after the expiration of the term in which sentence was imposed and probation granted, where the probationary period had not commenced.

III.

The final order of the District Court entered on January 21st, 1932, that the probation granted the defendant

on Count 3 of the indictment be "cancelled" and "nullified", is void and in excess of the court's powers.

IV.

The District Court erred in proceeding with the hearing of an oral motion to revoke the defendant's probation, over his objection, and denying his request for a reasonable continuance. The grounds of said objection and motion for a continuance, and the grounds of said error in overruling said objection and motion for a continuance, were, and are, that the defendant was summarily brought before the court on the afternoon of January 21st, 1932, without any previous notice of the character of the proceedings or the charges that would then and there be made against him, and that he was, therefore, unprepared to properly present his defense.

V.

The District Court erred in summarily proceeding to hear an oral motion to revoke the probation of the defendant in the absence of any previous notice given to him of such proceeding, over his objection that he was not informed (either orally or in writing) of the nature and cause of the accu*as*tion against him, or given reasonable notice of the specific charges of violation of the conditions of probation, so as to enable him to properly prepare his defense.

VI.

The District Court erred in overruling the objections of the defendant to proceeding with the hearing of the oral motion to revoke the probation theretofore granted the defendant. The grounds of said objection, and the grounds of said error in overruling said objection, were, and are, that the defendant had no notice of the character

and nature of the charges which would be contended violated the conditions of his probation, and no reasonable opportunity to consult counsel or prepare his defense to the matters and things that might be developed in the testimony and evidence on the proceedings.

VII.

The District Court erred in refusing the defendant his request for a reasonable opportunity to produce evidence and witnesses to rebut the testimony of the plaintiff where the court summarily proceeded with the hearing to revoke the defendant's probation without apprising him in advance of said hearing of the specific charges of violation of the conditions of his probation.

VIII.

The District Court erred in entering its final order that the probation granted the defendant theretofore on, to-wit, the 4th day of May, 1931, be "cancelled" and "nullified," and that the defendant be committed to the federal penitentiary at McNeil Island for a period of five years, because the matters and things established by the evidence did not constitute a violation of any of the specified conditions of the defendant's probation.

IX.

The District Court erred in revoking the probation of the defendant and ordering him committed to the federal penitentiary at McNeil Island for a period of five years, because the evidence failed to establish that any of the specified conditions of the defendant's probation had been violated.

X.

The District Court erred in admitting in evidence government's Exhibit No. 1, over the objection of the defendant, as follows:

"MR. CHRISTENSEN: Note an objection to the introduction of that in evidence, as incompetent, for the reasons that no proper foundation has been laid for its

introduction; that it does not purport to be the best evidence of the releases of Mr. Burns from the County Jail—

THE COURT: Don't make your exceptions too long, Mr. Counsel. This is entirely informal.

MR. CHRISTENSEN: I just want to be sure that I have covered it, your Honor, to have it appropriately stated, that is all.

THE COURT: All right. Proceed.

to which ruling of the court the defendant then and there duly took an exception. Said Government's Exhibit No. 1 is the first page of a copy of a report bearing the typewritten signature of "J. W. Ghoslin, Special Agent, Bureau of Prohibition", which said report was attached to a letter of the witness Rumberg addressed to the United States Attorney; said Exhibit No. 1 is in words and figures as follows:

No. 10,096-C.	"Los Angeles, California
Jimmy Burns	August 19, 1931
Gov. Exhibit	
No. 1	
Filed 1/21/1932	MEMORANDUM
R. S. ZIMMERMAN, Clerk	
By Francis E. Cross,	
Deputy Clerk	

"During the past ninety days this office has been subjected to considerable criticism and the service in general ridiculed because of the alleged weekly visits of Jimmie Burns to his home in Beverly Hills. We have been told repeatedly that Burns is allowed to go home and spend entire days and nights there, during which time he entertains friends and puts on liquor parties. In order to either conform or *disapprove* these continued reports, I checked the gate book of the Los Angeles County Jail on the 18th instant and find that Burns has been absent from the jail in custody of a Deputy U. S. Marshal as follows:

DATE	AUTHORITY	TIME OUT	CUSTODY OF	TIME IN
May 10	Judge James	8:30 A. M.	Lessner	9.06 P. M.
14	" "	9:25 A. M.	"	4:50 P. M.
19	" "	9:20 A. M.	"	5:10 P. M.
22	" "	9:30 A. M.	"	4:55 P. M.
29	" "	1:02 P. M.	"	5:00 P. M.
June 16	" "	9:20 A. M.	Jones	C O
20	" "	9:35 A. M.	Lessner	5:35 P. M.
26	" "	10:30 A. M.	"	4:30 P. M.
30	" "	10:35 A. M.	"	C O
July 12	" "	9:43 A. M.	"	6:00 P. M.
17	" "	9:40 A. M.	"	5:30 P. M.
23	" "	9:30 A. M.	"	6:18 P. M.
Aug. 8	" "	9:45 A. M.	"	6:30 P. M.
13	" "	9:15 A. M.	"	6:30 P. M.
18	" "	9:20 A. M.	"	6:30 P. M.

The "CO's" on the above list indicate that Burns returned some time after the count of prisoners at 6:00 P. M. and it is apparent that the records indicating a return after 6:00 P. M. cannot be relied upon, as on the 18th instant the records indicate that he returned at 6:30 P. M., while as a matter of fact Special Agent Rumberg and myself were visiting with him at his home in Beverly Hills at 6:20 P. M. and it would require approximately forty-five minutes to drive from his home to the jail.

At the time I checked the gate book, I was under the impression that some individual was impersonating Deputy Marshal Lessner, and this impression was strengthened when upon inquiry at the Marshal's office yesterday afternoon, I learned that Mr. Lessner was in San Pedro serving papers."

By reason whereof, the petitioner and appellant prays that said final order or judgment revoking his probation may be reversed, and that such other and further order or orders may be made as shall carry into effect the law in such cases made and provided.

Jimmie Burns

Petitioner

By Otto Christensen
Attorney for Petitioner

[Endorsed]: No. 10096-C In the District Court of the United States Southern District of California Central Division United States of America, Plaintiff vs. Jimmie Burns. Defendant Assignments of Error Filed Mar 8-1932 R. S. Zimmerman, Clerk By G. J. Murphy Deputy Clerk Otto Christensen 1016 Broadway Arcade Bldg. TRinity 8041 Los Angeles, Calif. Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT OF
CALIFORNIA, CENTRAL DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
vs.
JIMMIE BURNS,
Defendant.

No. 8850-C
ORDER

Upon the reading of the petition of Jimmie Burns for appeal, and consideration of the assignments of error filed and presented therewith,

IT IS ORDERED, that the appeal be allowed, and is hereby allowed.

Dated at Los Angeles, California, this 6th day of March, 1942.

Geo. Cosgrave
U. S. District Judge

[Endorsed]: No. 8850-C. In the District Court of the United States Southern District of California Central Division. United States of America, Plaintiff vs. Jimmie Burns, Defendant. Order. Filed Mar 6 1942. R. S. Zimmerman, Clerk. By G. J. Murphy, Deputy Clerk. Otto Christensen 1016 Broadway Arcade Bldg. TRinity 4041 Los Angeles, Calif. Attorney for

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

UNITED STATES OF AMERICA	:	
Plaintiff,	:	
-vs-	:	No. 10096-C
JIMMIE BURNS,	:	BOND FOR COSTS.
Defendant.	:	

KNOW ALL MEN BY THESE PRESENTS:

That Western Surety Company, a corporation organized and existing under and by virtue of the laws of the State of South Dakota, is held and firmly bound unto the United States of America, in the sum of Two Hundred Fifty ($250.00) and 00/100 Dollars, for the payment of which well and truly to be made, the said Western Surety Company hereby binds itself, its successors and assigns, jointly and severally, firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS SUCH, THAT

WHEREAS, JIMMIE BURNS, the Complainant in the above entitled cause, is prosecuting an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the decision of the District Court of the United States, Southern District of California, Central Division, made and entered on the 21st day of January, 1932.

NOW, THEREFORE, if the said Complainant, Jimmie Burns, shall prosecute his said appeal to effect and answer all costs if he fails to make good his plea, then this obligation shall be void; otherwise, to remain in full force and effect. The Western Surety Company shall not be liable for the payment of the fine imposed upon the said Jimmie Burns, or any part thereof.

IN WITNESS WHEREOF, the WESTERN SURETY COMPANY has executed these presents this 9th day of March, 1932.

[Seal] WESTERN SURETY COMPANY
By P. F. Kirby, Vice-President

Dated at Los Angeles, California, this 9th day of March, 1932.

I hereby approve the foregoing bond.
Dated the 10 day of Mar 1932.

R. S. Zimmerman,
Clerk

Approved.

.....

.....

District Judge

STATE OF CALIFORNIA :
: ss.
County of Los Angeles :

On this 9th day of March, in the year one thousand nine hundred and 32, before me, E. D. TATE, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared, P. F. KIRBY, known to me to be the duly authorized Vice-President of WESTERN SURETY COMPANY, and the same person whose name is subscribed to the within instrument as the Vice-President of said Company, and the said P. F. KIRBY acknowledged to me that he sub-

scribed the name of Western Surety Company, thereto as principal, and his own name as Vice-President.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

E. D. Tate

Notary Public in and for Los Angeles County, State of California.

[Seal] My Commission Expires Sept. 15, 1932

[Endorsed]: No. 10096-C In the United States District Court in and for the Southern District of California Central Division United States of America Plaintiff, vs. Jimmie Burns, Defendant. Bond for Costs. Filed Mar 10 1932. R. S. Zimmerman, Clerk By G. J. Murphy, Deputy Clerk. Western Surety Company 405 H. W. Hellman Bldg. Los Angeles, California Michigan 6097

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	No. 10096-C
vs.	)	PRAECIPE.
	)	For Record on Appeal
JIMMIE BURNS,	)	to the United States
	)	Circuit Court of
Defendant.	)	Appeals.

To the Clerk of the United States District Court:

Please include in the transcript of record in the above stated case the following papers:

1. The judgment and sentence; the order granting the defendant's probation and the conditions of same.

1. a. Indictment.

2. The commitment, committing the defendant to the County Jail, and return of the Marshal thereon.

2. a. Any written charges filed respecting any violation of probation.

3. The bill of exceptions on the proceedings had on the 21st day of January, 1932 to revoke defendant's probation.

4. The judgment of the court revoking the probation of the defendant.

5. The commitment, committing the defendant to the United States Penitentiary.

6. The petition for appeal.

7. The assignments of error.

8. Order allowing appeal.

9. Appeal bond.

10. Citation and return thereon.

11. Copy of this Praecipe.

Dated this 8th day of March, 1932.

Otto Christensen

Attorney for Defendant.

[Endorsed]: No. 10096-C In the District Court of the United States Southern District of California Central Division United States of America, Plaintiff vs. Jimmie Burns, Defendant Praecipe Filed Mar 8-1932 R. S. Zimmerman, Clerk by G. J. Murphy Deputy Clerk Otto Christensen 1016 Broadway Arcade Bldg. TRinity 8041 Los Angeles, Calif. Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
CALIFORNIA CENTRAL DIVISION

UNITED STATES OF AMERICA,
Plaintiff, No. 10096-C

vs.

JIMMIE BURNS,
Defendant.

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 66 pages, numbered from 1 to 66 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; indictment; judgment and sentence and order granting the defendant's probation and the condition of same; the commitment, committing the defendant to the county jail and return of the marshal thereon; the commitment, committing the defendant to the United States Penitentiary; the judgment of the court revoking the probation of the defendant; bill of exceptions; petition for appeal; assignment of errors; order allowing appeal; bond for costs on appeal and praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $99.65 and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to $10.40 and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this 22 day of March, in the year of Our Lord One Thousand Nine Hundred and Thirty-two, and of our Independence the One Hundred and Fifty-sixth.

R. S. ZIMMERMAN,
Clerk of the District Court of the United States of America, in and for the Southern District of California.

(Seal) By R. S. ZIMMERMAN.

No. 6798

United States
Circuit Court of Appeals
For the Ninth Circuit

JIMMIE BURNS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PERNAU-WALSH PRINTING CO., 755 MARKET ST., SAN FRANCISCO

At a stated term, to wit, the October Term, A. D. 1931, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday, the twenty-third day of May, in the year of our Lord One Thousand Nine Hundred and Thirty-two.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge, Honorable JEREMIAH NETERER, District Judge.

[Title of Cause.]

ORDER OF SUBMISSION.

ORDERED above cause argued by Mr. Otto Christensen, counsel for appellant, and by Mr. Harry Graham Balter, Assistant United States Attorney, counsel for the appellee, and submitted to the Court for consideration and decision.

At a stated term, to wit, the October Term, A. D. 1931, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday, the twentieth day of June, in the year of our Lord One Thousand Nine Hundred and Thirty-two.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM P. JAMES, District Judge, Honorable FRANK H. NORCROSS, District Judge.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT.

By direction of the Court, ORDERED that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk and that a judgment be filed and recorded in the minutes of this Court in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION OF UNITED STATES CIRCUIT COURT OF APPEALS.

Appeal from the District Court of the United States for the Southern District of California, Central Division.

Before: WILBUR and SAWTELLE, Circuit Judges, and NETERER, District Judge.

WILBUR, Circuit Judge:

This appeal is taken by appellant from an order revoking a probationary order upon the suspended execution of a sentence of five years in the United States penitentiary at McNeil Island, State of Washington, and issuing a commitment in accordance with the original sentence.

The appellant plead guilty to three counts of an indictment and on May 4, 1931, was sentenced upon the first count to imprisonment in the Los Angeles County jail for a period of one year, and on the second count was fined $2000, and to stand committed to the Los Angeles County jail until paid; on the third count was sentenced to five years' imprisonment in McNeil Island penitentiary. The probationary order is as follows:

> "Execution of said sentence of imprisonment on the third count is suspended during such time as the defendant reports regularly every three months in writing, beginning with this date, to the Federal Probation Officer of this

Court; during which time he entirely refrains from any violation of any law with the possible exception of parking and traffic ordinances, and in all respects conduct himself as a law abiding citizen. In case of the violation of the terms of probation, the defendant will be brought before the Court and sentenced."

On January 21, 1932, appellant was brought before the Court for hearing on the question of the revocation of probation. Thereupon, without previous notice to the defendant, the Judge announced his intention of proceeding with the hearing. Upon request of the appellant the hearing was postponed for one hour, during which time he secured the attendance of an attorney to represent him on the hearing. The attorney requested a continuance of the hearing but this was refused. The Court stated:

"The newspapers for several days have been full of accounts reflecting, in most serious measure and degree, upon this defendant who pleaded guilty to certain offenses, was given a jail sentence and also sentenced to a term in the Federal Penitentiary, which was suspended during the period of his good behavior. This is an extremely simple matter that the Court has before it. The question is whether he has violated the terms of his probation. The matter was brought to the attention of the Court by the United States attorney's office, whereupon the Court ordered that the defendant be brought before the Court. We are here

now to investigate. I don't feel that it is a matter in the nature of a trial, and, inasmuch as the matter has been brewing for several days, and the defendant himself might have anticipated such a proceeding, I see no harm in going ahead with the proceedings necessary to determine the question before the Court. Therefore, the request for a continuance is denied."

Thereupon, and over the objection of the appellant, testimony was adduced to the general effect that during the period for which the appellant had been committed to the Los Angeles County jail he had frequently been absent from the jail. The order of the Court revoking probation was based upon this proposition as appears from the statement of the Court at the conclusion of the hearing:

"Now, gentlemen, there is enough obviously before this Court to show that the spirit of the probation was not in any sense complied with. The idea that one person sentenced to the county jail should over a period of 3 months, a little bit more than 3 months, be taken out for on 15 different occasions from 10 o'clock in the morning until 9 o'clock at night, oftentimes, that of itself is something that should bring the blush of shame to anybody entrusted with the execution of the law.

"That fact alone is contrary entirely to the spirit of probation. Probation supposes penitence, a degree of penitence. I very much

regret that any Court should be compelled to listen to the failure of performance of the official duty that has been visited here today. And my earnest suggestion is that that prisoner and everybody else stand hushed when the instruments of the law are made the conveniences, the accommodation, the servants of the lawbreakers.

"The probation given to this defendant, granted this defendant is cancelled, nullified, and it is ordered that forthwith the United States marshal execute the sentence originally pronounced, that being confinement in the Federal penitentiary at McNeil's Island, in the State of Washington, for the period of 5 years."

Upon the hearing, one A. P. Ramburg, Special Agent of the United States Department of Justice, certified that he saw the appellant on August 18, 1911, at appellant's home; that he investigated the jail records and ascertained therefrom that upon the assumed authority of an order of the United States District Judge appellant had been absent from the jail on fifteen different days for periods ranging from three hours and fifty-eight minutes to thirteen hours; that the records of the county jail showed that with the exception of one day the appellant was released in the custody of the United States Deputy Marshal Lemmer, and on that day to one James; that he had ascertained that a United

States District Judge had authorized appellant's release for the purpose of taking him to a dentist; that the order was in writing dated May 8; that at the time of the visit to appellant's house on May 18 United States Deputy Marshal Lessner stated that he had taken the appellant from the county jail upon an order of the United States District Judge.

Appellant's counsel objected to the introduction of jail records, cross-examined the witness at some length, but was not permitted to continue the cross-examination as long as he desired, and excepted to the refusal of the Court to permit further examination.

R. S. Zimmerman, Clerk of the Court, testified that while it was the usual practice to have an order entered before a prisoner could be released from the county jail, no such order had been entered ordering the release of appellant.

The appellant testified on his own behalf that he had been in the county jail eight and one-half months on his sentence and during all but thirty days of that time he had been a trusty. With reference to his absence from the county jail he testified as follows:

> "'Q. Do you know how you happened to be taken out of the jail house?
>
> "'A. Why, if I don't remember wrong, I think that Ames Peterson, I think that was he who it was that went to Judge James and

explained the situation that my teeth were bad, that he would like to have the Court order me to go to a dentist to have them repaired. And Judge James, he got it.'

"That at the times he was out of the county jail he went to the dentist's office; that he saw the orders; that there was more than one order issued; that he didn't remember the exact wording of them; that one Jones had an order to take him out also and he guessed that it was for only once, and that Lessner had the other order.

"'Q. Do you recall whether those orders were for treatments or for specific occasions.

"'A. For treatments.'

"That he had a lot of work done and as a matter of fact he was not finished with it yet."

"'Q. And actually what—would he give you treatments?

A. Oh, yes, sir. Sure; you can look at my mouth and see that work that is unfinished right now.

Q. How long would he work on your mouth each time you were there?

A. Oh, it is according as to how much I could stand; an hour or an hour and a half; sometimes more. I would rest a little while; he would work more.

Q. What was the name of your dentist?

A. It has been so long since I have been there, I can't really recollect what is his name.

Q. What is his office at?

A. Hollywood Boulevard and Cherokee Street.'

That when he went to this dentist and left the county jail that he would go under the assumption that he could legally do so under a Court order; that he absolutely did not pay anybody to get out or perform any favors for him while he was out; that he never rewarded Mr. Jones or Mr. Lessner on any of these occasions, but might have given them a cigar. * * *

'I could look in a phone book and tell you in a moment the name of the dentist'; that he did not go to the dentist each and every time that he went out of jail; 'I would call him and if he could take me, if he wasn't, his appointments were not all made for that day, he would take me; it was only a couple of times that I didn't—just a few times.'

'Q. By Mr. REDWINE.—Now, the record shows on May 30th, you left the jail on May 30th, at 10 o'clock A. M. and did not return until 9:06 P. M. You were not in his office all of that time?

A. No, sir, I don't remember the incident, but I don't suppose I was.

Q. What did you do?

A. Well, I might have had something to eat.

Q. What else did you do?

A. That is all.

Q. Well, what were you doing until 9:06 P. M. in the evening?

A. Well, listening to the radio, something like that.

Q. Where were you listening to the radio?

A. At my home.

Q. How many times did you go to your home when you were really supposed to be going to the dentist?

A. Well, I really couldn't tell you, just quite a few times.

Q. Most of the time?

A. Pretty near.

Q. Did you give Mr. Lessner anything for taking you to your home?

A. Absolutely not.

Q. Do you know why it was that he should be willing to stay out until 9, and after 6 o'clock at night when he took you down to your home if you didn't give him any remuneration?

A. I don't know. I never gave him any remuneration.

Q. Did you give him any liquor of any kind?

A. Absolutely not.

Q. Well now, on May 14th, you were taken out of jail at 9:25 A. M. and returned at 4:50 P. M. Were you in the dentist's office all of that time?

A. From 10 to 5, that is practically——

Mr. REDWINE.—Yes.

A. Well, I might have got to the dentist around noon, and would be there a couple of hours by the time to get back here, it was pretty close to that.

Q. Why was it that you didn't call up the dentist's office before you left the jail to see whether you could have an appointment or not?

A. You cannot telephone from the jail.

Q. What arrangement did you make with Lessner to come over and take you out of the jail and pick you up at the county jail? Did he just say, "Come on, we will go up to the dentist's office"?

A. Well, for instance, if I had a date today with the dentist a week or more, when they would ask him when he could see me again, he would state some date——

Q. You knew also——

Mr. CHRISTENSEN.—Let him finish.'

The witness further testified that he was a prisoner in the county jail, knew that the marshal had come to the county jail to take him out of the county jail and that it was the usual thing to get permission to go to the dentist's office; that it was the usual thing with a lot of people.

'Q. Why was it that you didn't make an appointment then with the dentist for a particular date?

A. For the reason that the marshal was not able to get there and come and get me, because he was doing something else.'

The witness then further testified that at the time Mr. Lessner and Mr. Rumburg were at his home on August 18th he was there about an hour and a half and that he had been to the dentist that day; that he didn't remember right then the name of the dentist, but that he could get it in a minute; that the dentist was on the corner of Hollywood Boulevard and Cherokee Street on the second floor of the building; that it was months ago and that the dentist has a very odd name.

'Mr. CHRISTENSEN.—May I suggest, in the interests of saving time—I intend to bring the dentist in, if I am permitted.

The WITNESS.—If I could get a phone book I could tell you.'

The witness further testified that when he was out with Mr. Lessner he went to his home several times; that he did not go to his home every time.

'Q. You went practically every time you left the jail, you went to your home sooner or later during the period you were out of the jail?

A. No, not every time.

Q. You think you during that time would stay out and have supper out very often?

A. I had a little bite to eat. If it would be supper, it would be earlier than supper.

Q. How did Lessner know when you wanted to leave the jail? Did you send word over there to him?

A. I want to explain that if I may, I could explain that in a minute. If, for instance he would take me out today, I would go to the dentist, I would ask the dentist would he be ready for me again, when he would be ready for me again. Well, if he would say, for instance, next Tuesday, then I would say to Mr. Lessner, "Well, the dentist can take me next Tuesday." Then, if Mr. Lessner's duties were such that he could take me out, he would do so. If not, I would have to stay there. Consequently, it was quite a jumbled up affair in keeping our affairs with the dentist.

Q. When you left the jail and didn't go to the dentist's office were you and Lessner riding around or were you at your house and would Lessner ride around, is that right?

A. Yes.'

On redirect examination the witness testified that when he was out he asked to be taken home to get a change of clothes; that usually each time he went to the house he went for a change of linen; that by looking at the telephone book he could give the district attorney the name of the dentist."

We have quoted at length from the testimony of appellant because it shows that appellant admitted that he had been frequently away from the jail in custody of a deputy United States Marshal; that these visits were for his own convenience, and that they were not confined to trips to and from the dentist's office. The Judge evidently considered that this conduct justified the revocation of the probation regardless of the exact terms of the order which counsel sought to produce, for the reason that in any view of the matter appellant's conduct was not justified. The order of revocation was not based upon a technical escape but upon the fact that the appellant had not acted in good faith in carrying out the order of the trial Judge, but, on the contrary, had taken advantage of a general permit to carry out his own purposes quite independently of the basis and theory upon which the order was given.

We have thus far refrained from mentioning another subject of inquiry before the Court at the time of the proceedings looking toward the revocation of probation, for the reason that the order is not predicated from the evidence thus adduced. The effect of the evidence offered against appellant upon this subject was that he had attempted to influence a witness confined in the county jail to make a false statement in an affidavit for the purpose of defeating the prosecution in that case, knowing that the statement was false. The appellant denied the tes-

timony thus adduced, and while appellant's counsel desired to offer further testimony to rebut the evidence against him, we must assume that the Court's refusal to permit such testimony was predicated upon the belief that the matter was immaterial in view of the conclusion he had reached on the question of the conduct of the appellant in absenting himself from the jail.

The appellant's contention is that he is entitled to a hearing upon the charges against him as a constitutional right under the due process of law clause of the federal constitution. The trial Judge was of the opinion that the proceedings were summary. The statute upon which the Court acted, 18 U. S. C. A. § 725, 43 Stat. 1260, § 2, provides as follows:

> "At any time within the probation period the probation officer may arrest the probationer without a warrant, or the court may issue a warrant for his arrest. Thereupon such probationer shall forthwith be taken before the court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed."

There are two lines of decisions dealing with the power of the Court to revoke probation. In one line of decisions it is held that the probationer is entitled to a hearing upon the charge against him and that the order of probation can be only revoked upon cause thus shown. It is also held in all such cases that the cause must be either a violation of the law or of the terms of the order granting probation, or the instructions issued in pursuance thereof. Other decisions hold that the granting of probation is an act of grace which may be summarily revoked at any time.

The Circuit Court of Appeals of the Second Circuit, speaking through Judge Mack, who has had a great deal of experience with probation matters, said:

> "The act itself has no express restrictions on the power to revoke the probation or to modify the terms, conditions, or time thereof. These are matters for the exercise of a sound judicial discretion. The remedy for an abuse of such discretion or for other irregularities or errors in the exercise of the jurisdiction is solely by appeal, not by writ of habeas corpus." United States v. Mulligan, 48 F. (2d) 93, 94.

In Furrow v. United States, 46 F. (2d) 647, the Circuit Court of Appeals of the Second Circuit had under consideration a direct appeal from an order revoking probation. It appeared that the appellant in that case had no written notice of the alleged

infractions of the terms of probation and that counsel, although aware of the nature of the charges, delayed making motion of continuance until the time set for hearing. The Court concluded that the appellant had notice of the charge against him, was not taken by surprise, and had an opportunity to defend himself. Under these circumstances, the Court stated that as there was ample evidence to support the conclusion of the trial Court the order would be sustained.

It should be borne in mind in dealing with the question of probation, and violation thereof, that the extending of probation to a person convicted of crime is purely a matter of grace and that the revocation thereof is merely a withdrawal of the leniency so extended. The term of imprisonment which follows the revocation of probation is for the commission of the offense with which the probationer stands convicted, and is not in any sense a punishment for the violation of the terms of the probation. Congress, in giving the power of revocation, or, perhaps it should be said, in recognizing the inherent power of the Court to revoke its order suspending the imposition or execution of a sentence, has attached no condition whatever to such revocation. Assuming, without deciding, that Congress had the power so to do, it has not in fact done so. (People v. Court of Sessions, 141 N. Y. 288). Should the courts under such circumstances attach conditions and restrictions to the power of

the trial judge? The whole theory of probation is that of giving to the convicted person an opportunity for reformation, and when it is manifest that the probationer is not taking advantage of the opportunity given him probation should be revoked and the appropriate sentence for the crime theretofore committed should be imposed or executed. When that point has arrived in the history of the probationer where it is sufficiently manifest to the judge that the object of probation has failed, there is no reason why probation should not be revoked. In extending probation the judge acts upon his knowledge of the character and situation of the convicted person and usually upon expressions of penitence and promises to reform, and is thus in a position to determine when these promises are without intention or power to perform.

The Circuit Court of Appeals of the Fourth Circuit, in Riggs v. United States, 14 F. (2d) 5, had occasion to consider the question of revocation of probation. The matter was presented by writ of habeas corpus and also by direct appeal. After stating the purposes of probation and the necessity of confessing great latitude on the district judges in enforcing the same in order to accomplish the objects of probation, the Court said:

> "It is not necessary that we pass upon the defendant's contention that he was entitled to a hearing upon the question of the breach of the terms of his probation, for it affirmatively

appears of record that at the time of the revocation of the probation and imposition of sentence he was present in his own proper person, and the government made it appear by evidence satisfactory to the court that the conditions of the probation had been violated, and no exception appears to have been taken to such action of the court."

District Judge Sibley in Campbell v. Aderhold, 36 F. (2d) 366, 367, said:

"Probation is wholly discretionary and of grace, and not at all a right. It is in no sense a bargain. If the judge becomes satisfied that the probation is a failure and the best interests of the public and the defendant are not being subserved, and that different treatment is required, he has the right and the duty to terminate the experiment and let the law take its original course. * * * Unless the broad discretion to revoke be fully recognized, much greater caution will have to be exercised in extending this grace originally, and the benefits of the act will become greatly restricted."

It has been held by a number of state courts that probation may be revoked summarily without a hearing. People v. Dudley, 173 Mich. 389; People v. Trombly, 173 App. Div. 497, s. c. 160 N. Y. S. 67; People v. Goodrich, 149 N. Y. S. 406. It is unnecessary to decide in this case whether probation can be revoked arbitrarily and without a hearing.

In the case at bar appellant knew that he was charged with being unlawfully and improperly outside the prison to which he had been sentenced. He was represented by an attorney, evidence was adduced against him and in his testimony he admitted the truth of the charge. Any evidence he sought to adduce on his behalf in that regard was by way of extenuation. The judge certainly was not required to hear this evidence, if, in his opinion, it was immaterial.

Order and sentence affirmed.

[Endorsed]: Opinion. Filed June 20, 1932 Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 6798.

JIMMIE BURNS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

JUDGMENT.

UPON APPEAL from the District Court of the United States for the Southern District of California, Central Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the District Court of the United States for the Southern District of California, Central Division, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

[Endorsed]: Judgment. Filed June 20, 1932. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing ninety-one (91) pages, numbered from and including 1 to and including 91, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 26th day of August, A. D. 1932.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 17, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted, and the case is assigned for argument on Monday, November 14th next, after the cases heretofore assigned for that day.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

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CHARLES ELMORE C
CL

No. 378

In the Supreme Court

OF THE

United States

.....Term.....

JIMMIE BURNS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Ninth Circuit

BRIEF IN SUPPORT OF PETITION

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Probation Act, 18 U. S. C. A., Secs. 724, 725, 727.

In the Supreme Court

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JIMMIE BURNS,
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vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Ninth Circuit

To the Honorable, the Supreme Court of the United States:

Jimmie Burns, the above named petitioner, prays that a writ of certiorari be issued by this court to review a judgment of the Circuit Court of Appeals for the Ninth Circuit entered on the 20th day of June, 1932 (R. 91), affirming a judgment of the United States District Court for the Southern District of California, Central Division; and in this behalf petitioner respectfully shows:

Emphasis ours wherever used.

Opinion of Court Below

The opinion of the Court of Appeals was rendered on June 20th, 1932, and is reported in the record at pages 73-90.

Statement of the Case

1. The Circuit Court of Appeals affirmed the order of the trial court revoking a probationary order upon the suspended execution of a sentence of five years in the United States Penitentiary at McNeil Island, State of Washington, imposed on Count III of an indictment charging a violation of Section 3, Title II, of the *National Prohibition Act.*

2. The first count of the indictment charged a violation of Section 65 of the *Federal Penal Code;* the second count of the indictment charged a conspiracy to violate Section 3, Title II, of the *National Prohibition Act,* and Count III charged the violation of Section 3, Title II, of the *National Prohibition Act.*

On May 4th, 1931, the appellant was sentenced on his plea of guilty to imprisonment in the Los Angeles County Jail for a period of one year on the first count, fined $2000 on the second count, and that he "be imprisoned in the United States Penitentiary at McNeil Island, State of Washington, for the period of five years on the third count of the indictment"; execution of said sentence of imprisonment on the third count was suspended and probation granted for a period of five years, upon the condition that the petitioner "entirely refrains from any violation of any law, with the possible exception of park-

ing and traffic ordinances, and in all respects conduct himself as a law-abiding citizen" (R. 9).

The petitioner on, to-wit: the 11th day of May, 1931, was committed to the County Jail pursuant to the judgment and sentence imposed against him on Count I of the indictment, where he remained in the custody of the United States until the 21st day of January, 1932, when the trial court entered its order revoking the probation theretofore granted the petitioner on Count III of the indictment. A commitment issued in accordance with the original sentence, pursuant to which the petitioner was forthwith committed to the United States Penitentiary at McNeil Island (R. 12, 14). The order of revocation was made at a term of court subsequent to the sentence.

3. On the 21st day of January, 1932, the appellant was summarily brought before the trial court for a hearing "on revocation of probation," without any previous notice thereof having been given the petitioner (R. 15, 19-20). The hearing proceeded forthwith without any written charges filed respecting any violation of probation (R. 66), or oral statement being made of charges constituting a violation of the terms of probation (R. 19), upon the overruling of petitioner's objections to proceeding with the hearing and request for a continuance. The grounds of the objection to proceeding with the hearing and the request for a continuance were that the petitioner was not apprised of the nature and character of the charges, or the nature or cause of the accusations against him, or given reasonable notice of the facts in issue, and that no reasonable opportunity had been afforded him to consult counsel or prepare a defense (R. 20-21).

The court, in overruling the objections of the appellant, and in denying his request for a continuance, stated that the newspapers had contained accounts reflecting upon the appellant and "we are here now to investigate. I don't feel it is a matter in the nature of a trial, and, inasmuch as the matter has been brewing for several days, and the defendant himself might have anticipated such a proceeding, I see no harm in going ahead with the proceedings necessary to determine the question before the court" (R. 21-22). This statement of the court was the only notice to petitioner of the question that was before the court for determination and related to what became known as the publicized Doolan incident, but which was not the ground upon which the trial court revoked the probation, and regarding which the Circuit Court of Appeals said, "We have thus far refrained from mentioning another subject of inquiry before the court at the time of the proceedings looking toward the revocation of probation, for the reason that the order is not predicated from the evidence thus adduced" (R. 84).

The trial court's order of revocation was, as stated by the Circuit Court of Appeals, based upon testimony relating to the petitioner's frequent absences from the County Jail in custody of a United States Marshall (R. 84).

There was no notice to the petitioner or the slightest intimation by either the United States Attorney or the court that these jail absences occurring months earlier would be urged as a ground for revocation of his probation; and respecting which the court and the United States Attorney had not seen fit to take any action, although investigated by the Special Agents of the

United States and reported by them in writing more than six months previous to the hearing (Gov. Ex. No. 1, dated Aug. 19, 1931; R. 23).

The Circuit Court of Appeals also held that the order of revocation was *not* based upon a technical escape, "but upon the fact that the appellant had not acted in good faith in carrying out the order of the trial court, but, on the contrary had taken advantage of a general permit to carry out his own purposes quite independently of the basis and theory upon which the order was given" (R. 84).

4. The evidence disclosed that upon the hearing one A. P. Rumberg, Special Agent of the United States Department of Justice, testified that he saw the petitioner on August 18th, 1931, at petitioner's home (R. 22); that on that occasion he ascertained from United States Deputy Marshal Lessner that United States District Judge James had authorized petitioner's release for the purpose of taking him to a dentist for treatments; that the order was in writing, dated May 8th, 1931; that at the time of the visit to petitioner's house on August 18th, the Deputy Marshal stated that he had taken the petitioner from the county jail by an order of the United States District Court (R. 27-28); that the Deputy Marshal stated that he had taken the petitioner "to the dentist on occasions since the order was written" (R. 27-28); the Special Agent further testified that he caused an investigation to be made of the county jail records to ascertain the number of times the petitioner had been released from the county jail (R. 22-23). This investigation was made by J. W. Ghoslin, special agent of the Bureau of

Prohibition, who was not a witness; the results of his investigation being reduced to writing and filed as a report with the agent in charge. This report, over objections, was received in evidence as Exhibit No. 1 and stated that the records of the county jail reflected that petitioner had been taken from the county jail on fifteen occasions, i.e., five in May, four in June, three in July and three in August, 1931, upon the authority of Judge James, and in custody of the United States Deputy Marshal, Henry Lessner, with the exception of one occasion when he was in custody of United States Deputy Marshal Jones, and that he was out of jail for several hours on each of said days.

After a limited cross-examination, the court interrupted the question partially formulated by counsel to conduct an examination of his own of the witness. Upon the conclusion of the court's examination, when counsel attempted to continue his cross-examination, the court dismissed the witness with the statement: "We are not conducting a trial," and denied the right of further cross-examination, to which action of the court an exception was noted (R. 30).

R. L. Zimmerman, Clerk of the Court, testified that while it was the usual practice when a prisoner is authorized to be released from the county jail, for such fact to appear on his records, his records did not disclose that any authorization was granted to take the petitioner from the county jail (R. 32).

5. James E. Burns, the petitioner, testified in his own behalf that he was an inmate of the county jail, serving his sentence on Count I of the indictment; that he was

one of the trusties in the jail, having been designated as such because of meritorious conduct; that he had a lot of bad teeth and that there were no facilities in the jail for doing dental work (R. 41); that his attorney, Ames Peterson, obtained an order from United States District Judge James that he might be taken in custody of the United States Marshal for treatments to a dentist; that he had a lot of work done on his teeth, and that the work was not yet finished (R. 41-42); that he went to his home several times after visiting the dentist but not every time (R. 44-47); that when he was out he asked to be taken home to get a change of clothes and that usually each time he went to his home he went for a change of linen (R. 48). He further testified that he could not phone the dentist from the jail (R. 46); that there was considerable confusion in making and keeping appointments with the dentist because the deputy marshal's duties were such that he could not always comply with the appointment as made with the dentist on the occasion of the previous visit (R. 47).

6. At the conclusion of the petitioner's testimony counsel asked for an opportunity to present further evidence on behalf of the petitioner, i.e., the testimony of the dentist, the orders of the court authorizing the petitioner's release from the county jail, etc. The request was denied, the court saying: "I am not prepared to have a hearing in this case that will run to the proportions of a criminal trial" (R. 49). An exception was taken to this ruling of the court.

7. Upon this evidence the court revoked the probation granted the petitioner, for the reason that probation had

been granted during the "good behavior" of the petitioner, and that it appeared from the evidence "that the spirit of probation" had not been complied with. To these findings and order of the court revoking probation, the petitioner took an exception (R. 50).

The Questions Presented

The Circuit Court of Appeals held that proceedings to revoke probation were summary, following that line of state decisions holding that the granting of probation is an act of grace which may be summarily revoked at any time, and overruling the conclusions reached in *U. S. vs. Hollandsworth*, 34 Fed. (2) 423, 427 (C. C. A. 4), and that line of state decisions in which it is held that the probationer is entitled to notice of the charge and to a hearing upon the charge against him and that the order of probation can only be revoked upon cause thus shown, i.e., that the cause must be either a violation of the law or of the terms of the order granting probation, or the instructions issued in pursuance thereof.

1. The question thus arises whether a probationer is entitled to a "judicial hearing," in accordance with the established rules of "judicial procedure," i.e., notice of the specific charge, a reasonable opportunity to prepare his defense, a reasonable opportunity of cross-examination, and a reasonable opportunity to call witnesses in his own behalf.

2. The question also arises whether probation can be revoked upon a finding by the court that the probationer has not acted in "good faith" and "the spirit of probation was not complied with," in the absence of a showing

that the probationer violated the law, or the terms of the order granting probation, or the instructions issued in pursuance thereof.

REASONS FOR GRANTING THE WRIT

I.

The Circuit Court of Appeals Has Decided a Question of Substance Relating to the Construction of a Statute of the United States Which Has Not Been, But Should Be, Settled By This Court.

1. The Circuit Court of Appeals in effect held that proceedings to revoke probation under the *Probation Act* (18 U. S. C. A., Secs. 724-727, 43 Stat. 1259, Secs. 1-4) are "summary" and that no specific charge need be filed or made against the probationer, nor judicial hearing granted in accordance with the established rules of judicial procedure. This court has never yet passed upon the question of the applicable procedure in revocation proceedings under the probation statute, nor settled the question of the rights, if any, of a probationer to notice of the specific charge of violation of his probation, and obviously ought to do so.

2. The Circuit Court of Appeals held that probation is an act of grace which may be summarily revoked at any time and that Congress "has attached no condition whatever to such revocation," and that probation may be revoked regardless of the absence of any showing of violation of the law, or of the terms of the order granting probation, or the instructions issued in pursuance thereof. This court has never yet passed upon the question of the power of the court to revoke probation where

there has been a compliance with the specified terms and conditions of the order granting probation, and obviously ought to do so.

The Probation Act is printed as an appendix hereto.

II.

The Circuit Court of Appeals Has Decided Important Matters Which Conflict With the Decisions of Other Circuit Courts of Appeals on the Same Matter.

The holdings of the Circuit Court of Appeals set forth above under the caption "Reasons For Granting the Writ" (which in the interest of brevity are not repeated here), are apparently in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *Hollandsworth vs. U. S.*, 234 Fed. (2) 423, 427. In the *Hollandsworth* case the various sections of the Probation Act were construed; the Circuit Court of Appeals holding that the probationer could not be sentenced until he had been given notice of the *specific* charge, and an opportunity to be heard in his defense, "and until the court, upon hearing, shall have *judicially* determined that his conduct during the probationary period has not conformed" to the terms and conditions set out in the order of probation. The Circuit Court of Appeals neither distinguished nor commented on the foregoing decision of the Circuit Court of Appeals for the Fourth Circuit, although apparently directly contrary to their announced views. The court, in the *Hollandsworth* case, supra, in a footnote, states that the rule announced by them is one adopted in most jurisdictions where similar questions

have arisen under state probation laws, and cites numerous supporting state cases at page 428. It is also in conflict with the concurring opinion in the case of *Riggs v. U. S.*, 14 Fed. (2d) 5, 10 (C. C. A. 4), and *Furrow v. U. S.*, 46 Fed. (2d) 647, of the same Circuit.

The petitioner respectfully represents that accompanying this petition, and as an exhibit thereto, is a certified copy of the transcript of the entire record in the case, including the proceedings in the Circuit Court of Appeals for the Ninth Circuit.

WHEREFORE, it is respectfully submitted that this petition should be granted.

OTTO CHRISTENSEN,
Attorney for Petitioner.

CERTIFICATE OF VERIFICATION

STATE OF CALIFORNIA,
County of Los Angeles—ss.

OTTO CHRISTENSEN, being first duly sworn, deposes and says: That he is counsel for JIMMIE BURNS, Petitioner in the within and foregoing action; that he prepared the within Petition and that the matters and things therein are true as he verily believes, and that the same is not interposed for the purpose of delay.

.....

Counsel.

Subscribed and sworn to before me this.....day of September, 1932.

(SEAL) .....

Notary Public in and for the County and State Aforesaid.

In the Supreme Court

OF THE

United States

.....Term.....

JIMMIE BURNS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION

I.

OPINION OF THE COURT BELOW

The opinion of the Circuit Court of Appeals is printed in the Record at pages 73 to 90.

Jurisdiction

The judgment of the Circuit Court of Appeals was rendered on June 20th, 1932 (R. 90). This court has jurisdiction under Section 240 (a) of the *Judicial Code* as amended by the Act of February 13, 1925, 43 *Stat.* 936.

Statement

A full statement appears in the petition, and in the interest of brevity is not repeated here.

Specifications of Error

1. The Circuit Court of Appeals erred in holding that the District Court had committed no error in proceeding with the hearing of an oral motion to revoke the petitioner's probation, over his objection, and in denying his request for a reasonable continuance. The grounds of said objection and motion for a continuance, and the grounds of said error in overruling said objection and motion for a continuance, were, and are, that the defendant was summarily brought before the court on the afternoon of January 21st, 1932, without any previous notice of the character of the proceedings, or the charges that would then and there be made against him, and that he was, therefore, unprepared to properly present his defense (R. 15, 19-22).

2. The Circuit Court of Appeals erred in holding that the District Court had committed no error in summarily proceeding to hear an oral motion to revoke the probation of the defendant in the absence of any previous notice given to him of such proceedings, over his objection that he was not informed (either orally or in writing) of the nature and cause of the accusations against him, or given reasonable notice of the specific charge of violation of the conditions of probation so as to enable him properly to prepare his defense (R. 15, 19-22).

3. The Circuit Court of Appeals erred in holding that the District Court committed no error in refusing the petitioner's request for a reasonable opportunity to pro-

duce evidence and witnesses to rebut the testimony of the plaintiff where the court summarily proceeded with the hearing to revoke probation when the petitioner had not been previously apprised of the specific charges of violation of the terms of his probation (R. 48-50).

4. The Circuit Court of Appeals erred in holding that the District Court committed no error in revoking petitioner's probation, although the matters and things established by the evidence did not constitute a violation of any of the conditions of the order of probation (R. 50).

5. The Circuit Court of Appeals erred in holding that the District Court had committed no error in revoking petitioner's probation, notwithstanding that the evidence failed to establish that any of the specified conditions of the order of probation had been violated (R. 50).

ARGUMENT

I.

One Who Is Granted Probation During Compliance With Specified Terms and Conditions Has a Right to Notice of the Specific Charge of Violations Thereof and to a Hearing as to Whether or Not He Has Violated the Conditions Imposed, According to Some Well Recognized and Established Rules of Judicial Procedure, and Only After Such a Hearing Can the Probation Granted Be Revoked, and Then Only for a Violation of the Law or of the Terms of the Order Granting Probation.

For the convenience of the court the pertinent sections of the Probation Act (18 U. S. C. A., Secs. 724, 725, 727, 43 Stat. 1259, 1260, Secs. 1, 2, 4) are printed as an Appendix hereto.

In interpreting the Probation Act, the Circuit Court of Appeals in the case of *Hollandsworth vs. U. S.*, 34 Fed. (2d) 423, 427 (C. C. A. 4), held that the power of the trial court to revoke a probation and sentence the probationer "may not be exercised unless it is made to appear that he has failed to comply with the terms and conditions prescribed for him"; also that this power may not be exercised until the probationer "has been given notice of the specific charge and an opportunity to be heard in his defense, and until the court, upon a hearing, shall have judicially determined that his conduct during the probationary period has not conformed to the course outlined in the order of probation."

The Circuit Court of Appeals in the *Hollandsworth* case, supra, in a footnote at page 428, states that the foregoing rule is one adopted in most jurisdictions where similar questions have arisen under state probation laws, and cites numerous supporting state cases.

In the case of *Riggs vs. U. S.*, 14 Fed. (2d) 5, (C. C. A. 4), Judge McDowell, in a concurring opinion, at page 10, in construing the statute, said:

> "The fact that the conditions of probation are expressly required by the statute to be put in writing, and a copy thereof furnished to each probationer, most clearly implies that probation may not be revoked unless a condition of the probation has been broken * * * That which is certainly implied in a statute is as binding as that which is expressed. That the probation statute was not intended to give the courts an arbitrary power of revocation seems a necessary conclusion. Treating as a whole the express power to revoke and the implied restriction, the

result is that the statute contains a grant of power to revoke because of a breach of a condition of probation, and does not grant power to revoke merely because a charge has been made that the probationer has broken a condition."

In 54 *A. L. R.* 1471, it is stated:

"In nearly every jurisdiction wherein the question has been raised, it has been held that a convicted defendant, released under a suspended sentence, is entitled to notice and a hearing on the issue whether he has broken the conditions of the suspension of sentence, before the suspension may be revoked."

In the case of *State vs. Zolantakis*, 259 Pac. 1044 (Utah), 54 A. L. R. 1463, the court had before it for consideration the probation statute of Utah, which is substantially similar to the Federal Probation Act, and in which case similar questions as here presented were before the court. The majority of the court were of the opinion that the probationer was entitled to have filed either an affidavit, motion, or other written pleading, setting forth the facts relied upon for a revocation of the probationary order and a hearing upon the question of whether or not he has complied with the conditions imposed.

The Circuit Court of Appeals in the instant case held that the trial court was correct in its opinion that the proceedings were summary and cites the cases of *U. S. v. Mulligan*, 48 Fed. (2d) 93, 94 (C. C. A. 2) and *Furrow vs. U. S.*, 46 Fed. (2d) 647 (C. C. A. 4). The passage cited from the *Mulligan* case is as follows:

"The act itself has no express restrictions on the power to revoke the probation or to modify the

> terms, conditions, or time thereof. These are matters for the exercise of a sound judicial discretion. The remedy for an abuse of such discretion or for other irregularities or errors in the exercise of the jurisdiction is solely by appeal, not by writ of habeas corpus."

The questions here presented were not before the Second Circuit in the *Mulligan* case by appeal, but were in part attempted to be presented on an appeal from an order denying a writ or habeas corpus.

The *Furrow* case (which is incorrectly cited in the opinion as being in the Second Circuit) is entirely in harmony with the previous opinion of the Fourth Circuit in the *Hollandsworth* case, and holds that the action of the trial court was in accordance with its views stated in the *Hollandsworth* case. The court held that the appellant had actual notice of the charges against him (although not in writing), and unnecessarily delayed making his motion for a written notice of the charges; that he was clearly not taken by surprise and was accorded every opportunity to defend himself as to the charges. The Circuit Court of Appeals said:

> "While it would perhaps be the better practice to give one charged with a violation of probation notice in writing as to the charges against him, yet in this case it is not necessary to decide the question as to whether the notice should be in writing, as the motion for a written notice of the charges came too late."

In the instant case, the record discloses that the petitioner was not advised of any fact relied upon by the

plaintiff until the evidence was received at the time of the hearing. He had, upon being summarily brought before the court, objected to the proceedings because he knew nothing of the character of the proceeding, other than that there was "a proceeding pending here with reference to a judgment and sentence of this court, wherein this court placed him on probation * * * and that an effort is being made now to present facts to the court * * * which may lead to a revocation of that order," and as to what "the issues are that are involved, I don't know" (R. 19-22). The court was then on notice as to the dilemma of both the petitioner and his counsel as to what issues they were called upon to meet, and should have directed the United States Attorney, if not in writing, to at least orally state what they proposed to charge as constituting violations of the conditions of probation, and then granted the defendant a reasonable continuance to enable him to prepare his defense.

The court's action in proceeding summarily, is attributable directly to his viewpoint that it was not "a matter in the nature of a trial" and "we are here now to investigate" (R. 21). That the court had fully in mind the character of objection being made by counsel and that it was addressed to a lack of notice of the nature and character of the charges the petitioner would have to meet, and that he was not advised of the facts in issue, is made clear from the court's own statement, in denying the objections to proceeding with the hearing and in overruling the motion for continuance, that the newspapers for several days had carried accounts reflecting in a serious degree upon the defendant. The court's reference to the newspapers had no relationship to the jail

absences of the petitioner, for that occurred some six months previous and could only have reference to the alleged Doolan incident which the trial court in its findings revoking probation, as well as the Circuit Court of Appeals in its opinion, held was not the ground of revocation.

We may well surmise what the evidence on the hearing would have disclosed had the petitioner been put on notice in advance of the hearing that the plaintiff charged him with having been illegally absent from the county jail. The petitioner would then have been in a position to have produced the Deputy United States Marshals as witnesses to explain their actions when they had him in custody, produced the orders under which the Marshals acted, and the dentist to show the character and condition of the petitioner's teeth and the nature and extent of the treatments. This evidence would have established considerable time spent on each occasion at the dentist's office; that the deputy marshals had numerous official papers to serve daily and did serve and discharge their official duties in transit to and from the dentist's office, and that at all times and in all respects the petitioner was under the direction of the said United States Marshals and did not act as a free-will agent during his absences from jail. Not having notice of any specific charges, the petitioner, on the conclusion of the Government's case and of his own testimony, took the only legal as well as logical step left for him to pursue, by requesting the court for a reasonable continuance to enable him to produce the foregoing witnesses and evidence (R. 49-50).

II.

The Important Question of Whether or Not Probation Can Be Revoked for Causes Other Than a Violation of the Terms of the Order Granting Probation Has Not Been, But Should Be, Passed Upon By This Court.

The Circuit Court of Appeals held that the Probation Act recognized "the inherent power of the court to revoke its order suspending the imposition or execution of the sentence" and that Congress "attached no condition whatever to such revocation" (R. 87). This holding by the Circuit Court of Appeals is directly in conflict with the opinions of the Circuit Court of Appeals of the Fourth Circuit in the cases of *Hollandsworth*, supra, and *Furrow*, supra, which are the only cases that we have been able to find reaching a Circuit Court of Appeals upon an *appeal* from an order revoking probation.

The lower court did not revoke petitioner's probation because he had violated any law, but because the petitioner had not complied with the "spirit of probation." Concerning his conduct in carrying out the order of the Judge respecting dental treatments (R. 28), the Circuit Court of Appeals found that the order of revocation was not based upon a violation of law, i.e., a technical escape, "but upon the fact that the appellant had not acted in good faith in carrying out the order of the trial judge, but, * * * had taken advantage of a general permit to carry out his own purposes quite independently of the basis and theory upon which the order was given" (R. 84); and this justified the court in revoking probation

regardless of whether or not it constituted a violation of the terms of the order granting probation.

The judgment of the court granting petitioner probation contains three specific conditions: (a) That he report in writing every three months to the probation officer of the court; (b) that he "entirely refrain from the violation of any law with the possible exception of parking or traffic ordinances," and (c) that he conduct himself as a "law abiding citizen" (R. 9).

There was no question in the case concerning condition "a." We contended in the court of appeals that condition "c", requiring the petitioner to conduct himself as a law abiding citizen, placed no inhibition against the defendant not already placed there by condition "b," which required him to "refrain from the violation of any law."

We urged upon the Circuit Court of Appeals at length that the evidence did not disclose that the petitioner had violated any law. The evidence failed to disclose any law violation on the part of the petitioner. Thus the question for decision by the Circuit Court of Appeals was whether or not a court can revoke probation for causes other than a violation of the specified conditions and terms of probation, and which question was decided adversely to the petitioner. There are numerous state cases which support the conclusions reached by the Circuit Court of Appeals for the Fourth Circuit in the *Hollandsworth* and *Furrow* cases, supra. They are:

State vs. Hardin, 183 N. C. 815, 818;
Williams v. State, 162 Ga. 815, 818;
State v. Zolantakis, 259 Pac. 1044 (Utah), 54 A. L. R. 1463;

Ex parte Lucero, 23 N. M. 433, L. R. A. 1918-C, 549;
Ex parte Hamm, 24 N. M. 33, L. R. A. 1918-D 694;
State v. Miller, 122 S. C. 468.

In the case of *Campbell v. Aderhold*, 38 Fed. (2d) 366, 367, on an application for a writ of habeas corpus, the District Judge said:

> "The conditions of probation ought to be definite and made plain to the probationer, and revocation ought not to be capriciously had if these conditions are observed."

Conclusion

Petitioner now stands committed to the penitentiary serving the five-year sentence originally imposed by the court. What the Circuit Court of Appeals in *U. S. vs. Antinori*, 59 Fed. (2d) 171, 172 (C. C. A. 5) said is unquestionably true of this severe sentence originally imposed by the court. In that case the court said:

> "In imposing sentences that are suspended, courts are apt to make the term of imprisonment longer, in order to make the threat more potent, than if the sentence were to be immediately served."

It is greatly desirable that this court settle the important questions of procedure on an application to revoke probation, as well as the important question of the court's power to revoke probation, in the absence of a showing of violation of the law or of the conditions and terms of the order granting probation. Because this court has never decided the questions here presented, and because the present decision conflicts with the decisions of

other Circuit Courts of Appeals, and for all the other grounds hereinbefore set forth, it is respectfully submitted that the petition for a writ of certiorari should be granted.

OTTO CHRISTENSEN,
Attorney for Petitioner.

APPENDIX

United States Code (Compact Edition)
Secs. 724-725-727

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§724. SUSPENSION OF IMPOSITION OR EXECUTION OF SENTENCES AND PLACING OF DEFENDANT UPON PROBATION; POWER OF COURTS; REVOCATION OR MODIFICATION OF PROBATION; DUTIES OF PROBATIONER. The courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, shall have power, after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and *upon such terms and conditions as they may deem best;* or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The court may revoke or modify any condition of probation, or may change the period of probation. The period of probation, together with any extension thereof, shall not exceed five years.

While on probation the defendant may be required to pay in one or several sums a fine imposed at the time of being placed on probation and may also be required to make restitution or reparation or loss caused by the offense for which conviction was had, and may also be required to provide for the support of any person or persons for whose support he is legally responsible. (Mar. 4, 1925, c. 521, § 1, 43 Stat. 1259.)

§725. SAME; POWERS OF PROBATION OFFICERS; ARREST OF PROBATIONER. When directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable.

At any time within the probation period the probation officer may arrest the probationer without a warrant, or the court may issue a warrant for his arrest. Thereupon such probationer shall forthwith be taken before the court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed. (Mar. 4, 1925, c. 521, § 2, 43 Stat. 1260.)

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§727. SAME; DUTIES OF PROBATION OFFICERS. It shall be the duty of a probation officer to investigate any case referred to him for investigation by the court in which he is serving and to report thereon to the court. The probation officer shall furnish to each person released on probation under his supervision *a written statement of the conditions of probation* and shall instruct him regarding the same. Such officer shall keep informed concerning the conduct and condition of each person on probation under his supervision and shall report thereon to

the court placing such person on probation. Such officer shall use all suitable methods, not inconsistent with the conditions imposed by the court, to aid persons on probation and to bring about improvements in their conduct and condition. Each officer shall keep records of his work; shall keep accurate and complete accounts of all moneys collected from persons under his supervision; shall give receipts therefor, and shall make at least monthly returns thereof; shall make such reports to the Attorney General as he may at any time require; and shall perform such other duties as the court may direct. A probation officer shall have the power of arrest that is now exercised by a deputy marshal. (Mar. 4, 1925, c. 521, § 4, 43 Stat. 1260.)

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No. 378

In the Supreme Court of the United States

OCTOBER TERM, 1932

JIMMIE BURNS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 73–90) is reported in 59 F. (2d) 721.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 20, 1932. (R. 90–91.) The petition for certiorari was filed September 19, 1932. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the District Court erred in revoking petitioner's probation and remanding him to the penitentiary to serve a suspended sentence.

STATUTE INVOLVED

The applicable provisions of the Probation Act (Act of March 4, 1925, c. 521, 43 Stat. 1259; U. S. C., Title 18, Secs. 724, 725, 727) are set forth in the appendix to petitioner's brief and are therefore not repeated here.

STATEMENT

The petitioner pleaded guilty (R. 17) to all three counts of a criminal indictment filed in the District Court for the Southern District of California (R. 3–8). He was sentenced on the first count to imprisonment for one year in the Los Angeles County jail, and on the second count to pay a fine of $2,000. On the third count he was sentenced to imprisonment for five years in the penitentiary, but the judgment provided that (R. 9–10)—

> execution of said sentence of imprisonment on the third count is suspended during such time as the defendant reports regularly every three months in writing, beginning with this date, to the Federal Probation Officer of this court; during which time he entirely refrains from any violation of any law with the possible exception of parking and traffic ordinances, and in all respects conduct himself as a law-abiding citizen. In case of the

> violation of the terms of probation, the defendant will be brought before the Court and sentenced. Probation is granted for a period of five years.

The judgment was entered May 4, 1931, and petitioner was on that day committed to the Los Angeles County jail to serve the one-year sentence. (R. 8, 12.) On January 21, 1932, he was brought before the court for a hearing on the question whether his probation on the third count should be revoked. The court ordered an hour's recess to enable petitioner to procure the services of an attorney. The hearing being resumed, counsel for petitioner stated that he did not know what the issues involved were and requested a continuance in order that he might have an opportunity to "inquire into the situation." (R. 19–21.) The request was denied, the court saying (R. 21–22):

> The newspapers for several days have been full of accounts reflecting, in a most serious measure and degree, upon this defendant who pleaded guilty to certain offenses, was given a jail sentence and also sentenced to a term in the Federal Penitentiary, which was suspended during the period of his good behavior. This is an extremely simple matter that the Court has before it. The question is whether he has violated the terms of his probation. The matter was brought to the attention of the Court by the United States attorney's office, whereupon the Court ordered that the defendant be

> brought before the court. We are here now to investigate. I don't feel that it is a matter in the nature of a trial, and, inasmuch as the matter has been brewing for several days, and the defendant himself might have anticipated such a proceeding, I see no harm in going ahead with the proceedings necessary to determine the question before the Court.

No exception was taken to this ruling of the court.

The Government called three witnesses. A. P. Rumburg, a special agent of the Bureau of Prohibition, testified that, having received information that petitioner was permitted to leave the county jail for a full day at a time, he had caused an investigation to be made of the jail records to ascertain the dates and length of petitioner's absences from the jail. A copy of the jail record thereupon produced by the witness was admitted in evidence as an exhibit. (R. 22–23.) It showed that on fifteen days between May 10 and August 18, inclusive, petitioner was absent from the jail for periods ranging from three hours and fifty-eight minutes to twelve hours and thirty-six minutes; that during these absences he was in the custody of one "Lessner," or one "Jones" (Deputy United States Marshals), and that the absences were authorized by Judge James, a United States District Judge. (R. 24.) The witness further testified on direct and cross-examination that at his request one of the agents had talked to Judge James and had ascer-

tained that the latter had in May granted authority for taking petitioner to the dentist; that the witness had interviewed Lessner, who exhibited to him an order authorizing petitioner to be taken to the dentist; that the order was a general one, but the witness could not say whether it was limited to a single visit or was for general treatment (R. 27–28); that on August 18, 1931, at 5.45 o'clock p. m., the witness telephoned petitioner's home and asked for Lessner; that petitioner answered the call and said that Lessner was there but was in the bathroom and could not come to the telephone; that the witness, accompanied by another agent, thereupon proceeded to petitioner's home, where they arrived at 6.00 o'clock p. m. and were admitted by petitioner, who was "without a coat or hat and had on bedroom slippers"; that petitioner told the agents that Lessner was in the bathroom and would be out shortly; that in about ten minutes Lessner entered, apparently through a back door, with his hat and coat on, bringing "a couple of packages of cigarettes" (R. 25–26, 29–30); that the agents were there until 6.20 o'clock p. m. (R. 25) and left before petitioner and Lessner (R. 28).

After cross-examination of the witness had proceeded at some length it was interrupted by the trial judge, who personally conducted an examination of the witness. At the conclusion thereof the judge refused to permit further cross-exmination, saying "We are not conducting a trial." An ex-

ception to this action of the court was noted. (R. 30.)

R. S. Zimmerman, clerk of the court, testified that in the usual course of procedure the granting of authority for the release of a prisoner from the county jail would be noted on his records, but that his records failed to disclose that any such authority had been granted as to petitioner. (R. 30–31.)[1]

Taking the stand in his own behalf petitioner, upon cross-examination, gave the following testimony (R. 44–45):

> Q. By Mr. REDWINE. Now, the record shows on May 30th, you left the jail on May 30th, at 10 o'clock A. M. and did not return until 9.06 P. M. You were not in his office all of that time?
>
> A. No, sir; I don't remember the incident, but I don't suppose I was.
>
> Q. What did you do?
>
> A. Well, I might have had something to eat.
>
> Q. What else did you do?
>
> A. That is all.
>
> Q. Well, what were you doing until 9.06 P. M. in the evening?

---

[1] Considerable testimony also appears in the record with reference to the alleged obtaining by petitioner from a fellow prisoner of a false statement contradicting a prior statement that the latter had given in connection with a certain kidnapping case (R. 32–40), but as this testimony was not made the basis for revoking probation it is not here discussed (R. 49).

A. Well, listening to the radio; something like that.

Q. Where were you listening to the radio?

A. At my home.

Q. How many times did you go to your home when you were really supposed to be going to the dentist?

A. Well, I really couldn't tell you; just quite a few times.

Q. Most of the time?

A. Pretty near.

On redirect examination petitioner stated that when he was out of the jail he asked to be taken home to get a change of clothes; that "usually each time he went to the house he went for a change of linen." (R. 48.)

At the conclusion of petitioner's testimony his counsel requested an opportunity to present further evidence. The request was denied, the court saying: "I am not prepared to have a hearing of this case that will run into the proportions of a criminal trial." (R. 48–49.) In rendering its decision, to which an exception was taken, the court stated, in part (R. 49–50):

> Now, gentlemen, there is enough obviously before this court to show that the spirit of the probation was not in any sense complied with. The idea that one person sentenced to the county jail should over a period of 3 months, a little bit more than 3 months, be taken out for on 15 different occasions from 10 o'clock in the morning until 9 o'clock at

night, oftentimes, that of itself is something that should bring the blush of shame to anybody entrusted with the execution of the law.

* * * * *

Upon appeal the order of the District Court was affirmed. (R. 90–91.)

ARGUMENT

I

The petitioner contends that his probation was revoked "summarily," and without any showing that he had violated the order of probation. We submit that the contention is without merit.

On the first count of the indictment petitioner was sentenced to imprisonment in the county jail for one year. On the third count he was sentenced to imprisonment in the penitentiary for five years, but execution of the sentence on the latter count was suspended and he was placed on probation for five years. One of the conditions of the probation was that petitioner should "in all respects conduct himself as a law-abiding citizen." (R. 9–10.) Bearing in mind the fact that the first year of the probationary period was to be spent in jail, we submit that the petitioner did not conduct himself as "a law-abiding citizen" when the evidence shows that in utter disregard of the purpose of his commitment and in flagrant abuse of the obvious intent of a general order permitting him to be taken to the dentist for treatment, he remained away from the jail on fifteen occasions during a three months'

interval for periods ranging from four to twelve and a half hours, most of which time was spent not with the dentist but in enjoying the comforts of his home.

Petitioner contends that the conditions of his probation were not breached because no law was violated. In other words, he asserts that the condition that he should conduct himself as a law-abiding citizen has the same meaning as the preceding condition in the probation order that the petitioner should refrain "from any violation of any law." As applied to a man who was to spend the first year of his probationary period in jail, we do not believe that such a construction of the probationary order is sound. The requirement that the petitioner should "in all respects conduct himself as a law-abiding citizen" was essentially one of good conduct. Prisoners have little opportunity to violate criminal laws, and in the light of this fact it seems clear that the District Judge, as indicated at the hearing on the revocation of probation (R. 49), intended by the order of probation that sentence should be suspended only so long as the petitioner's behavior was good.

To protect the public as well as the convict, much latitude must necessarily be allowed a District Judge in administering the Probation Act. We know of no reported case in which an order revoking probation has been reversed. If the condition of probation in question has the broader meaning

which the District Judge evidently intended it to have, there was clearly a breach of such condition, for, as was said by the court below (R. 84), the petitioner "had taken advantage of a general permit to carry out his own purposes quite independently of the basis and theory upon which the order was given." His conduct was clearly not consistent with any reasonable conception of the idea of good behavior, even for one in jail.

But even if the condition in question be given the stricter interpretation asserted by petitioner, we submit that there was a breach of the condition. Petitioner's abuse of the limited privilege conferred upon him of going to the dentist for treatment could not have occurred without the connivance of those who were charged with his custody. These officers could have been punished for contempt of court in disregarding the manifest intent of the order of commitment. If the petitioner was not equally guilty of contempt he was clearly a party to the flouting of the mandate of the commitment by the officers. In *United States* v. *Hoffman*, 13 F. (2d) 269, 272, affirmed, 13 F. (2d) 278, 280 (C. C. A. 7th), the court held under similar circumstances that the prisoner could be charged with conspiring with his custodians to commit a violation of Section 268 of the Judicial Code (U. S. C., Title 28, Sec. 385), which provides for the punishment of contempts of court. The proof in the instant case shows active cooperation by at least one

of the petitioner's custodians in the abuse by petitioner of the limited privilege accorded him to visit the dentist. (R. 25–26.)

It would thus seem that petitioner was guilty of a violation of law which constituted a clear breach either of the condition that he should refrain "from any violation of any law" or of the condition that he should "in all respects conduct himself as a law-abiding citizen." It is not necessary as a prerequisite to the revocation of probation that the probationer be convicted of an offense, but only that the proof shall be such as to satisfy the District Judge that an offense has been committed. See *Campbell* v. *Aderhold,* 36 F. (2d) 366 (N. D. Ga.).

While the courts below evidently based their decision on the ground that probation may be revoked, in the exercise of a sound judicial discretion, whenever a showing is made that the granting of probation has failed to accomplish its purpose, a doctrine which appears not only sound but which is supported by the decided weight of authority (see R. 86–89), the judgment of the court below may, we submit, be supported upon the ground that there was in the instant case a breach of the conditions upon which probation was granted. If this be true, there is obviously no conflict between the instant case and that of *Hollandsworth* v. *United States,* 34 F. (2d) 423 (C. C. A. 4th), upon which petitioner relies. While in that case the court expressed the view that probation may be revoked only where

one of the conditions specified in the order granting probation has been infringed, it sustained an order revoking probation on the ground that the conditions of probation had not been met. Although the opinions in the instant case and in the case cited seem to contain conflicting views as to the meaning of the probation laws, there is plainly no conflict of decisions, since revocation of probation was affirmed in both cases.

II

Petitioner also contends that it is essential to a lawful revocation of probation that the probationer be given notice in advance of hearing of the specific charges against him. While this argument finds support in a statement appearing in the opinion in the *Hollandsworth case, supra,* such statement was obviously dicta, as there was no question of notice involved in that case. Not only is there nothing in the Probation Act requiring such notice but there are provisions in the Act which indicate that notice is unnecessary. For example, in Section 2 of the Act it is provided (Appendix to Petitioner's Brief, p. 2) that—

> At any time within the probation period the probation officer may arrest the probationer without a warrant, or the court may issue a warrant for his arrest. Thereupon such probationer shall *forthwith* be taken before the court. (Italics ours.)

But in any event we do not believe that the question is one which this Court is required to decide.

The question was originally raised by a motion for continuance. (R. 20–21.) This motion was denied (R. 22) but no exception was taken. While this Court undoubtedly has the power in a criminal case to disregard the lack of an exception where manifest injustice would result, this is not such a case. Petitioner pleaded guilty to the offense as to which execution of sentence was suspended, and the criminal trial is over. He is admittedly guilty of a flagrant abuse of the limited privilege extended him as a prisoner and deserves no special consideration.

CONCLUSION

The probation was lawfully revoked after a fair hearing. There is, we submit, no conflict of decisions. The petition should be denied.

Respectfully submitted.

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OCTOBER, 1932.

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FILE COPY

No. 378

In the Supreme Court of the United States

OCTOBER TERM, 1932

JIMMIE BURNS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 73-90) is reported in 59 F. (2d) 721.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 20, 1932. (R. 90-91.) The petition for certiorari was filed September 19, 1932, and was granted October 17, 1932. (R. 93.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether under the Federal Probation Act probation may be lawfully revoked only upon a preliminary notice to the probationer and a judicial trial of the specific charges upon which revocation is sought, and, if so, whether the petitioner was given adequate notice and hearing.

2. Whether probation may be revoked only upon a violation of a condition of the order of probation, and, if so, whether the evidence establishes that the petitioner violated a condition of his probation.

STATUTE INVOLVED

The Federal Probation Act is set forth in the Appendix, *infra*, pp. 34–36.

STATEMENT

The petitioner pleaded guilty (R. 17) to all three counts of a criminal indictment filed in the District Court for the Southern District of California (R. 3–8). He was sentenced on the first count to imprisonment for one year in the Los Angeles County jail, and on the second count to pay a fine of $2,000. On the third count he was sentenced to imprisonment for five years in the penitentiary, but the judgment provided that (R. 9–10)—

> execution of said sentence of imprisonment on the third count is suspended during such time as the defendant reports regularly every three months in writing, beginning with this date, to the Federal Probation Officer of this court, during which time he entirely refrains

> from any violation of any law with the possible exception of parking and traffic ordinances, and in all respects conduct himself as a law abiding citizen. In case of the violation of the terms of probation, the defendant will be brought before the Court and sentenced. Probation is granted for a period of five years.

The judgment was entered May 4, 1931, and petitioner was on that day committed to the Los Angeles County jail to serve the one-year sentence. (R. 8, 12.) On January 21, 1932, he was brought before the court for a hearing on the question whether his probation on the third count should be revoked. The court ordered an hour's recess to enable petitioner to procure the services of an attorney. The hearing being resumed, counsel for petitioner stated that he did not know what the issues involved were and requested a continuance in order that he might have an opportunity to "inquire into the situation." (R. 19–21.) The request was denied, the court saying in part (R. 21–22):

> The newspapers for several days have been full of accounts reflecting, in a most serious measure and degree, upon this defendant who pleaded guilty to certain offenses, was given a jail sentence and also sentenced to a term in the Federal Penitentiary, which was suspended during the period of his good behavior. This is an extremely simple matter that the Court has before it. The question

> is whether he has violated the terms of his probation. The matter was brought to the attention of the Court by the United States attorney's office, whereupon the Court ordered that the defendant be brought before the court. We are here now to investigate. I don't feel that it is a matter in the nature of a trial, and, inasmuch as the matter has been brewing for several days, and the defendant himself might have anticipated such a proceeding, I see no harm in going ahead with the proceedings necessary to determine the question before the Court.

No exception was taken to this ruling of the court.

The Government called three witnesses. A. P. Rumburg, a special agent of the Bureau of Prohibition, testified that, having received information that petitioner was permitted to leave the county jail for a full day at a time, he had caused an investigation to be made of the jail records to ascertain the dates and length of petitioner's absences from the jail. A copy of the jail record thereupon produced by the witness was admitted in evidence as an exhibit. (R. 23–24.) It showed that on fifteen days between May 10 and August 18, 1931, inclusive, petitioner was absent from the jail for periods ranging from three hours and fifty-eight minutes to twelve hours and thirty-six minutes; that during these absences he was in the custody of one "Lessner," or one "Jones" (Deputy United States Marshals), and that the absences were au-

thorized by Judge James, a United States District Judge. (R. 24.) The witness further testified on direct and cross-examination that at his request one of the agents had talked to Judge James and had ascertained that the latter had in May granted authority for taking petitioner to the dentist; that the witness had interviewed Lessner, who exhibited to him an order authorizing petitioner to be taken to the dentist; that the order was a general one, but the witness could not say whether it was limited to a single visit or was for general treatment (R. 27–28); that on August 18, 1931, at 5.45 o'clock p. m., the witness telephoned petitioner's home and asked for Lessner; that petitioner answered the call and said that Lessner was there but was in the bathroom and could not come to the telephone; that the witness, accompanied by another agent, thereupon proceeded to petitioner's home, where they arrived at 6 o'clock p. m. and were admitted by petitioner, who was "without a coat or hat and had on bedroom slippers"; that petitioner told the agents that Lessner was in the bathroom and would be out shortly; that in about ten minutes Lessner entered, apparently through a back door, with his hat and coat on, bringing "a couple of packages of cigarettes" (R. 25–26, 29–30); that the agents were there until 6.20 o'clock p. m. (R. 25) and left before petitioner and Lessner (R. 28).

After cross-examination of the witness had proceeded at some length it was interrupted by the trial judge, who personally conducted an examina-

tion of the witness. At the conclusion thereof the judge refused to permit further cross-examination, saying, "We are not conducting a trial." An exception to this action of the court was noted. (R. 30.)

R. S. Zimmerman, clerk of the court, testified that in the usual course of procedure the granting of authority for the release of a prisoner from the county jail would be noted on his records, but that his records failed to disclose that any such authority had been granted as to petitioner.[1] (R. 30–31.)

Taking the stand in his own behalf, petitioner, upon cross-examination, gave the following testimony (R. 44–45, 47–48):

> Q. By Mr. REDWINE. Now, the record shows on May 30th—you left the jail on May 30th, at 10 o'clock A. M. and did not return until 9.06 P. M. You were not in his office all of that time?
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> A. No, sir; I don't remember the incident, but I don't suppose I was.
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> Q. What did you do?
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> A. Well, I might have had something to eat.
>
> Q. What else did you do?
>
> A. That is all.

---

[1] Considerable testimony also appears in the record with reference to the alleged obtaining by petitioner from a fellow prisoner of a false statement contradicting a prior statement that the latter had given in connection with a certain kidnapping case (R. 32–40), but as this testimony was not made the basis for revoking probation it is not here discussed (R. 49).

Q. Well, what were you doing until 9.06 P. M. in the evening?

A. Well, listening to the radio; something like that.

Q. Where were you listening to the radio?

A. At my home.

Q. How many times did you go to your home when you were really supposed to be going to the dentist?

A. Well, I really couldn't tell you; just quite a few times.

Q. Most of the time?

A. Pretty near.

* * * * *

Q. When you left the jail and didn't go to the dentist's office were you and Lessner riding around or were you at your house and would Lessner ride around, is that right?

A. Yes.

On redirect examination petitioner stated that when he was out of the jail he asked to be taken home to get a change of clothes; that "usually each time he went to the house he went for a change of linen." (R. 48.)

At the conclusion of petitioner's testimony his counsel requested an opportunity to present further evidence. The request was denied, the court saying, "I am not prepared to have a hearing of this case that will run into the proportions of a criminal trial." (R. 48–49.) In rendering its de-

cision, to which an exception was taken, the court stated, in part (R. 49):

> Now, gentlemen, there is enough obviously before this court to show that the spirit of the probation was not in any sense complied with. The idea that one person sentenced to the county jail should over a period of 3 months, a little bit more than 3 months, be taken out for on 15 different occasions from 10 o'clock in the morning until 9 o'clock at night, oftentimes, that of itself is something that should bring the blush of shame to anybody entrusted with the execution of the law.

Upon appeal the order of the District Court was affirmed. (R. 90–91.) This Court granted a writ of certiorari. (R. 93.)

SUMMARY OF ARGUMENT

I

The notice and hearing accorded the petitioner were adequate. Both the language of the Federal Probation Act and its legislative history disclose the intent of Congress that the granting and revocation of probation should rest in the discretion of the District Judge, and the Federal courts have uniformly held that wide latitude must be permitted in the administration of the Act. The District Judge is expressly given the power, without limitation, to revoke or modify any condition of probation and to revoke the probation itself. The statute does not expressly require any notice to be given the probationer or any hearing upon the charges upon which

revocation is sought. The absence of limitations upon the court's power to revoke probation and the failure to prescribe any procedure to be followed indicate that the court may determine for itself the method by which it ascertains the relevant facts and arrives at its conclusions.

Probation is not a contract, giving rise to vested rights, but a matter of grace. The privilege is extended only when the District Judge is satisfied "that the ends of justice and the best interests of the public" will be served. When it becomes manifest to the District Judge, by any form of proceeding which enables him fairly to determine whether or not the object of the probation has failed, the probation may be revoked.

If anything, the petitioner was accorded greater, rather than less, consideration than would have been necessary under the statute. While the advance notice given him of the proposed revocation of his probation was short, he was permitted to engage counsel who represented him at the hearing, to cross-examine the Government witnesses to a certain extent, and to testify in his own behalf. Although he was not furnished with a written specification, it is clear that he knew he was charged with being improperly outside the prison to which he had been sentenced, and his own testimony established the truth of this charge. Accordingly, it was not an abuse of discretion for the District Judge to refuse to allow the petitioner to introduce

further evidence since he had himself admitted repeated absences from the jail.

II

The petitioner's probation was revoked upon sufficient cause. The statute does not impliedly contemplate, as petitioner asserts, that probation may be revoked only upon a violation by the probationer of some condition of the probation. Such a limitation is not expressed in the statute, and it may not be implied in view of the District Judge's power to revoke *after the period of probation,* and therefore at a time when the conditions of the probation are no longer in effect. Probation, being granted only when the District Judge is satisfied that the ends of justice and the best interests of the public will be served, may be revoked whenever it appears to his satisfaction that the purpose of the privilege has failed.

Moreover, the petitioner violated the conditions of his probation, which were that he refrain "from any violation of law" and conduct himself "as a law abiding citizen." The requirement that he should conduct himself "as a law abiding citizen" was essentially one of good conduct. That the petitioner failed to meet this requirement is manifest from his flagrant abuse of the privilege granted him of being taken to the dentist for treatment.

Even if the conditions of the order of probation be interpreted as referring only to violations of law,

there was a breach of the conditions. By conniving with his custodians to abuse the limited privilege conferred upon him, the petitioner, if not guilty of a contempt of court for flouting the mandate of commitment, was guilty of a conspiracy to commit a contempt of court. Moreover, by taking a greater liberty than that to which he was entitled under the order, he was, if not guilty of an escape, guilty of conspiring with his custodians to commit a violation of Section 138 of the Criminal Code, which covers the offense of permitting prisoners to escape.

ARGUMENT

I

THE NOTICE AND HEARING ACCORDED THE PETITIONER WERE ADEQUATE

The petitioner, assimilating the revocation of probation to a criminal trial, contends that probation may not be revoked without a "judicial hearing" in accordance with "established rules of judicial procedure."[2] He defines the requisite hearing as including (Pet. 8)—

[2] The petitioner's right to a notice of the charges upon which revocation of his probation was sought and a period in which to prepare his defense was originally raised by a motion for a continuance. (R. 20–21.) This motion was denied, but no exception was taken to the action of the court. (R. 22.) While this Court may disregard the lack of an exception in a criminal case where manifest injustice would result, this is not such a case. The petitioner by his own statements is guilty of a flagrant abuse of the limited privilege extended to him as a prisoner.

> notice of the specific charge, a reasonable opportunity to prepare his defense, a reasonable opportunity of cross-examination, and a reasonable opportunity to call witnesses in his own behalf.

The Government contends that no set or standardized procedure is required for the revocation of probation; that, at least so long as the District Judge does not act arbitrarily, probation may be revoked summarily and without the formal requisites of a trial; and that the notice and hearing given the petitioner were adequate.

The power of the Federal courts with respect to the granting and revocation of probation exists only as granted by the Federal Probation Act. See *United States* v. *Murray*, 275 U. S. 347, 354. Section 1 of that Act (p. 34, *infra*) provides that the courts of the United States having original jurisdiction of a criminal action shall have the power—

> when it shall appear *to the satisfaction of the court* that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, * * * to suspend the imposition or execution of sentence and to place the defendant upon probation *for such period and upon such terms and conditions as they may deem best;* * * *. (Italics ours.)

Section 1 provides further that—

> The court may revoke or modify any condition of probation, or may change the period of probation.

Section 2 provides that the probation officer, when directed by the court, shall report to the court as to the conduct of the probationer, whereupon the court may take such action "as shall seem advisable." Section 2 further provides that—

> At any time within the probation period the probation officer may arrest the probationer without a warrant, or the court may issue a warrant for his arrest. Thereupon such probationer shall forthwith be taken before the court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed.

The language of the statute and its legislative history clearly disclose the intent of Congress that the granting and revocation of probation should rest within the discretion of the trial judge, and the Federal courts have uniformly held that wide latitude must necessarily be permitted to the trial judge in the administration of the statute. *Riggs* v. *United States,* 14 F. (2d) 5, 9 (C. C. A. 4th), certiorari denied, 273 U. S. 719; *Jianole* v. *United States,* 58 F. (2d) 115 (C. C. A. 8th); *Reeves* v. *United States,* 35 F. (2d) 323, 325 (C. C. A. 8th); *Campbell* v. *Aderhold,* 36 F. (2d) 366, 367 (N. D.

Ga.). See House Rept. No. 423, 68th Cong., 1st Sess.; Hearings of February 21, 1924, before a subcommittee of the Senate Judiciary Committee on S. 1042 and S. 1729, 68th Cong., 1st Sess., pp. 19, 22, 23.

The statute places no conditions or limitations upon the power of the District Judge to revoke probation except as to the time within which he must act. It does not expressly require any preliminary notice to the probationer, either written or oral, of the charges upon which revocation of probation is sought, nor does it expressly provide for any hearing, formal or otherwise, upon such charges. On the contrary, Section 2 provides that upon the arrest of the probationer he shall *forthwith* be taken before the court, and that *thereupon* the court may revoke the probation. When Section 2, requiring that the probationer be summarily arrested and brought before the court, is read with the provision of Section 1 that "The court may revoke or modify any condition of probation," it seems clear that notice is not required and that if any be given, the character of the notice and the nature of the hearing are matters within the sound discretion of the District Judge. The lack of any limitation upon the power to revoke probation and the failure to define any procedure to be followed disclose the statutory purpose that the trial court shall upon such inquiry as it deems adequate proceed in such manner as it deems proper to revoke the probation.

This conclusion is consistent with the theory and the purpose of the statute. Probation is not a vested right but is a matter of grace, and the revocation thereof is merely a withdrawal of the privilege extended at the time the defendant is arraigned for sentence. When the imposition or the execution of a sentence is suspended, the sentence is not vacated nor is the judgment impaired. The convicted person is not freed from the legal consequences of his guilt, but is merely enjoying a conditional favor, contingently postponing his punishment, which may be withdrawn. When he is brought before the court upon the charge that he has violated his probation, he is not charged with a new crime, for which he is subject to a new punishment, and accordingly the revocation of probation is in no sense a trial. It is a proceeding with respect to the sentence and in the absence of express provisions should be subject to no procedural limitation which would not apply when sentence is imposed. The imprisonment which follows the revocation of probation is not punishment for violation of the probation, but for the commission of the offense of which the probationer stands convicted. See *Kaplan* v. *Hecht,* 24 F. (2d) 664, 665 (C. C. A. 2d); *Kennedy's Case,* 135 Mass. 48, 52; *Commonwealth* v. *McGovern,* 183 Mass. 238, 240; *Finer* v. *Commonwealth,* 250 Mass. 493, 496; *Richardson* v. *Commonwealth,* 131 Va. 802, 810; *Fuller* v. *State,*

122 Ala. 32, 38–39; *In re Patterson,* 94 Kan. 439, 442; *People* v. *Sapienzo,* 60 Cal. App. 626.

The theory of probation is that by suspending the sentence or its execution the convict is given an opportunity for reformation if the court is satisfied "that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby." See *United States* v. *Murray,* 275 U. S. 347. In granting probation the judge acts upon his knowledge of the character and situation of the convict, and often upon expressions of penitence and promises to reform. No formal hearing is then necessary and the defendant may not call or examine witnesses. The court may make such inquiries and be guided by any information *dehors* the record it considers pertinent. There is nothing in the statute requiring any different procedure when probation is revoked. *People ex rel. Woodin* v. *Ottaway,* 247 N. Y. 493, 497.

Without an extended hearing the judge should determine summarily and at any time whether the probationer continues worthy of the privilege extended. Knowledge by the convict that the favor he enjoys may be withdrawn by the court at any time imposes a moral restraint which must be exercised if the interest of the public is to be served as the statute contemplates. The force and virtue of the plan lies in the power reserved to speedily revoke the privilege and inflict the penalty imposed by law. (See House Rept. No. 423, 68th Cong., 1st Sess., p. 2.) If this power is hedged about with

procedural restrictions which delay its exercise while lawyers contend in court and appeals delay the execution of sentence, the purpose of the statute is defeated. Accordingly, the trial courts must necessarily have a large discretion not only in extending probation, but in its revocation. Unless courts are given broad power in the matter of revocation, greater caution will be exercised in extending probation, with the result that the benefits of the statute will be greatly restricted. See *Campbell* v. *Aderhold*, 36 F. (2d) 366, 367 (N. D. Ga.), *supra*.

Except possibly for certain *dicta* of one Circuit Court of Appeals, these conclusions are supported by the decisions of the Federal courts. In *United States* v. *Mulligan*, 48 F. (2d) 93 (C. C. A. 2d) the court, construing the Federal Probation Act, said (p. 94):

> The act itself has no express restrictions on the power to revoke the probation or to modify the terms, conditions, or time thereof. These are matters for the exercise of a sound judicial discretion.

In *Jianole* v. *United States*, 58 F. (2d) 115 (C. C. A. 8th), it was contended that probation could not be revoked without the filing of a verified information stating specifically the grounds upon which revocation was sought. It appears that when the probationer was brought before the trial court she raised the objection that she had not received sufficient notice of the charges against her to enable her properly to answer them. The court thereupon

required the probation officer to state the time and place of the alleged violations of probation, whereupon Government witnesses testified as to these transactions. At the close of the Government's evidence the probationer was given a continuance in which to secure evidence in opposition, which was thereafter submitted. In holding that no error had been committed by the District Judge, the court said (p. 117):

> The statute provides no formalities for the revocation of probation. On the contrary, the very language of the act discloses the purpose of Congress that the courts should deal with the subject, *not arbitrarily, but promptly and summarily.* * * * Everything points to the purpose of the Congress to lodge a very broad discretion in the trial judge in the granting and revoking of probation. *To require formal proceedings would be subversive of the very purpose of the act.* (Italics ours.)

In *Campbell* v. *Aderhold,* 36 F. (2d) 366 (N. D. Ga.), *supra,* the contention was made that probation could not be revoked for conduct alleged to be a crime until conviction for it. In denying this contention the court said (p. 367):

> Probation is wholly discretionary and of grace, and not at all a right. It is in no sense a bargain. If the judge becomes satisfied that the probation is a failure and the best interests of the public and the defendant are not being subserved, and that differ-

ent treatment is required, he has the right and the duty to terminate the experiment and let the law take its original course.

If probation is an act of grace which may be revoked summarily, though not arbitrarily, by the District Judge, the probationer's contention that he should have been accorded a hearing substantially in the nature of a criminal trial is clearly unfounded.

But even if the statute be interpreted to require some notice and hearing, we submit that the procedure followed in the case at bar met all the requirements of the statute. While the advance notice of the proposed revocation was short, the hearing was postponed long enough for the petitioner to engage counsel to represent him at the hearing. He was permitted to cross-examine the Government witnesses to a certain extent, and in addition testified in his own behalf. While he was not furnished with a written specification of the precise charge against him, it is clear that he knew he was charged with being improperly outside of the prison to which he had been sentenced, and *in his own testimony he admitted the truth of this charge.* (R. 44–45.) Under these circumstances it was not an abuse of discretion for the District Judge to refuse to allow the petitioner to introduce further evidence. Having admitted the truth of the charge upon which probation was revoked, the petitioner could not have been prejudiced by the

failure to advise him formally of the charge or by the failure to permit him to introduce evidence.[3]

The petitioner relies upon *Hollandsworth* v. *United States,* 34 F. (2d) 423 (C. C. A. 4th). The only question there involved. so far as the instant case is concerned, was whether the failure by the District Judge to include in the written order of probation the oral conditions upon which he granted probation nullified the probation, and, therefore, prevented revocation thereof. The court, sustaining the revocation of probation, said (p. 428):

> It follows that, whenever it is charged that a probationer has failed to follow the instructions of the court, he may not be sentenced until he has been given notice of the specific charge and an opportunity to be heard in his defense, and until the court, upon hear-

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[3] Petitioner asserts that the evidence which he was not allowed to introduce would have established (Pet. Br. 8): "* * * considerable time spent on each occasion at the dentist's office; that the deputy marshals had numerous official papers to serve daily and did serve and discharge their official duties in transit to and from the dentist's office, and that at all times and in all respects the petitioner was under the direction of the said United States Marshals and did not act as a free-will agent during his absences from jail."

None of this evidence, part of which is inconsistent with petitioner's own testimony, would have contradicted the truth of the charge that he was "riding around" and improperly enjoying the comforts of his home when he should have been in jail or at the dentist's office.

> ing, shall have judicially determined that his conduct during the probation period has not conformed to the course outlined in the order of probation.

Although this statement is *dictum,* since there were no questions in the case as to notice or hearing and the sentence imposed upon revocation of probation was affirmed, it is not inconsistent with the decision in the case at bar. For reasons stated, the petitioner was accorded an adequate notice and a sufficient opportunity to be heard.[4]

The State decisions dealing with the revocation of probation are not wholly in accord. While many apparent inconsistencies are explained by variations in the applicable statutes, there is at least one case which holds, under a statute fairly comparable to the Federal statute, and under facts somewhat similar to those in the instant case, that the probationer, although not entitled to a trial by jury, is entitled to a judicial hearing otherwise in the nature of a criminal trial. *State* v. *Zolan-*

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[4] In *Riggs* v. *United States*, 14 F (2d.) 5 (C. C. A. 4th), the court said (p. 9):

"It is not necessary that we pass upon the defendant's contention that he was entitled to a hearing upon the question of the breach of the terms of his probation, for it affirmatively appears of record that at the time of the revocation of the probation and imposition of sentence he was present in his own proper person, and the government made it appear by evidence satisfactory to the court that the conditions of the probation had been violated, and no exception appears to have been taken to such action of the court."

takis, 70 Utah, 296.[5] This decision appears to be in conflict with the great weight of authority, which holds that probation, being a matter of grace and not a vested right, may be revoked summarily without a formal trial, that the matter of procedure is one which rests in the discretion of the court, and that neither notice to the probationer nor a trial of the issues of fact is required if under all the circumstances of the particular case the judge has not acted arbitrarily.[6] *People* v. *Dudley,* 173 Mich. 389, 395; *State* v. *Sullivan,* 127 S. C. 186; *State* v. *Miller,* 122 S. C. 468, 473–475; *People ex rel. Woodin* v. *Ottaway,* 247 N. Y. 493, 497, *supra; People* v. *Trombly,* 173 App. Div. 497; *People* v. *Goodrich,* 149 N. Y. Supp. 406; *People* v. *O'Donnell,* 37 Cal. App. 192; *People* v. *Sapienzo,* 60 Cal.

[5] It has been held under statutes not altogether like the Federal statute that probation may not be revoked without the probationer having been arrested and brought before the court as required by the statute, and without notice or hearing of any kind. *Plunkett* v. *Miller,* 161 Ga. 466; *State* v. *O'Neal,* 147 Wash. 169. The same conclusion has been reached where no statute was involved. *Ex Parte Lucero,* 23 N. M. 433. Such cases are clearly inapplicable to the case at bar.

[6] Of course no hearing is required where the statute expressly provides for revocation of probation without notice. *State* v. *Chandler,* 158 Minn., 447; *In re Patterson,* 94 Kan. 439. Cf. *State* v. *Stair,* 48 N. D. 472, 476, which involved a statute providing for termination of probation only "after a full investigation and personal hearing," and *Williams* v. *State,* 162 Ga. 327, 334–335, where the court discussed a statute which permitted revocation only after "due examination."

App. 626; *People* v. *Sanders,* 64 Cal. App. 1.[7] See also *Owen* v. *Smith,* 89 Nebr. 596; *Kennedy's Case,* 135 Mass. 48, 54; *Fuller* v. *State,* 122 Ala. 32, 40. Cf. *Sylvester* v. *State,* 65 N. H. 193.

Of the State decisions those of New York and Massachusetts are of chief importance in the case at bar. The Federal Probation Act was based largely upon the New York and Massachusetts probation statutes (House Rept. No. 423, 68th Cong., 1st Sess., p. 4), and, under well-established principles Congress must be deemed to have adopted the construction placed upon the New York and Massachusetts statutes by the courts of those States.

In construing the New York statutes, the New York Court of Appeals in *People ex rel. Woodin* v. *Ottaway, supra,* said:

> The power to stay execution, like the power to revoke the stay, or to place a defendant on probation, is confided to the court of original jurisdiction, which may be controlled in the exercise of its discretion by information *dehors* the record.

Thus, the revocation of the stay of execution was regarded as requiring no different procedure than that which is followed when sentence is imposed,

[7] Under the California statute (Penal Code, Sec. 1203), which is closely similar to the Federal statute, it is not necessary that the probationer be notified of the motion to revoke his probation, and probation may be revoked even if he is absent from the court at the time. *People* v. *O'Donnell,* 37 Cal. App. 192, *supra; People* v. *Sapienzo,* 60 Cal. App. 626, *supra.*

and it was recognized that the discretion to revoke might be influenced by information entirely outside the record, and was therefore not subject to review.

In Massachusetts the power to revoke probation is discretionary and is imposed in the trial court. *Commonwealth* v. *McGovern,* 183 Mass. 238.

II

THE PETITIONER'S PROBATION WAS REVOKED UPON SUFFICIENT CAUSE

The petitioner contends that his probation could be revoked only upon a showing that he had violated a condition of his probation; that to show a violation of his probation it was necessary to establish that he had violated a law; that the evidence does not establish that he had violated any law; and that therefore his probation was unlawfully revoked. The Government disputes the three premises upon which this conclusion rests.

In *Hollandsworth* v. *United States,* 34 F. (2d) 423 (C. C. A. 4th), *supra,* relied upon by the petitioner, the court said (p. 428):

> The power of the court to revoke a probation and sentence the probationer may not be exercised unless it is made to appear that he has failed to comply with the terms and conditions prescribed for him.

This statement was based upon the provision in Section 4 of the Federal Probation Act (p. 35, *infra*) which requires the probation officer to fur-

nish to each person released on probation "a written statement of the conditions of probation" and to "instruct him regarding the same." See also the concurring opinion in *Riggs* v. *United States,* 14 F. (2d) 5, 10, *supra; State* v. *Zolantakis,* 70 Utah, 296, 303, *supra.*[8]

The statement of the court in the *Hollandsworth* case finds some slight support in Section 4, but consideration of the statute as a whole in our belief, shows it to be erroneous. As previously stated, the statute places no express limitations upon the power of the District Judge to revoke probation. Nor is it expressly provided that probation may be revoked only upon the violation of a condition of the probation. The power given the District Judge under Section 1 at any time to revoke or modify any condition of probation or to change the period of probation shows that it was not the purpose of Congress to confer a vested right upon probationers to remain on probation under the terms and conditions originally prescribed, and seems to negative the claim that revocation is possible only if a condition has been vio-

[8] Various State decisions construing statutes which are not wholly comparable to the Federal statute have enunciated somewhat similar rulings. See *State* v. *Stair,* 48 N. D. 472, 476; *Williams* v. *State,* 162 Ga. 327; *State* v. *Miller,* 122 S. C. 468, 475. Similar statements have been made with respect to the court's power at common law to revoke a suspended sentence. *State* v. *Phillips,* 185 N. C. 614; *State* v. *Hardin,* 183 N. C. 815; *Ex Parte Lucero,* 23 N. M. 433; *Weber* v. *State,* 58 Oh. St. 616, 619.

lated. Moreover, the authority conferred upon the District Judge by Section 2 (*infra,* p. 35) to revoke probation *after the period of probation,* and therefore at a time when the conditions of the probation are no longer in effect, is not consistent with the view that revocation may be ordered only for a violation of such conditions. The statute thus appears to contemplate that the whole matter of the revocation, as well as the granting, of probation should rest, as does the question of sentence, in the sound discretion of the District Judge. (See pp. 15–22, *supra.*)

It is only by viewing probation as a contract, giving rise to legal rights which the convict may enforce against the court which granted the probation, that the statute may be interpreted as making revocation dependent upon a violation of some condition of the probation. Obviously probation is not a contract or bargain. *Jianole* v. *United States,* 58 F. (2d) 115, 117 (C. C. A. 8th), *supra; Campbell* v. *Aderhold,* 36 F. (2d) 366, 367 (N. D. Ga.), *supra; Richardson* v. *Commonwealth,* 131 Va. 802, 810, *supra.* See *In re Patterson,* 94 Kan. 439, 442, *supra.* And the failure to insert proper conditions, or any condition at all, in the order of probation, has no effect upon the court's power to terminate it. *United States* v. *Mulligan,* 48 F. (2d) 93 (C. C. A. 2d), *supra; People* v. *Trombly,* 173 App. Div. 497, *supra; Commonwealth* v. *McGovern,* 183 Mass. 238, *supra.* See *Archer* v. *Snook,* 10 F. (2d) 567, 568 (N. D. Ga.).

We believe that the provisions of the statute relating to "a written statement of the conditions of probation" were intended for the benefit and guidance of the convict and not as a limitation upon the power of revocation. While the conditions so prescribed must be observed, and while revocation may be had for their violation, the court should not be limited by these conditions but should be free to revoke probation for acts equally as reprehensible as those expressly forbidden in the order.[9]

The District Judge can not foresee all the contingencies that may arise from the future conduct of the probationer which may affect "the ends of justice and the best interests of the public." If the District Judge's power to revoke is limited to the express terms of the order, so that the Government takes the risk of any loose language, it will result that probation orders will be burdened with unnecessary detail, courts will hesitate to grant probation where it would otherwise be extended, appeals will be taken to delay the revocation, and the purpose of the statute will be defeated.

In *United States* v. *Mulligan,* 48 F. (2d) 93 (C. C. A. 2d), *supra,* a habeas corpus proceeding, it was contended that the power to revoke proba-

[9] The necessity for stringent supervision of criminals placed upon probation has been commented upon by the courts (*Finer* v. *Commonwealth*, 250 Mass. 493, 497) and was prominently in the minds of those who were influential in securing the enactment of the Federal Probation Act. See House Rept. No. 423, 68th Cong., 1st Sess., p. 5.

tion was dependent upon allegation and proof that some condition expressed in the probation order had been violated. With regard to this contention, the court said (p. 94):

> However desirable it may be that at least the general terms of the probation be expressed in the order, nevertheless, in the absence of a statutory requirement and in view of the fact that the suspension of sentence may continue even after the probation period is ended, we can not deem the insertion of the terms and conditions of probation in the order as requisite to its validity or as a jurisdictional prerequisite to the revocation of probation.

We submit that the correct interpretation of the statute is that given it by the court below (R. 87):

> The whole theory of probation is that of giving to the convicted person an opportunity for reformation, and when it is manifest that the probationer is not taking advantage of the opportunity given him probation should be revoked and the appropriate sentence for the crime theretofore committed should be imposed or executed. When that point has arrived in the history of the probationer where it is sufficiently manifest to the judge that the object of probation has failed, there is no reason why probation should not be revoked.

See also cases cited at pp. 15, 17–18, *supra*.

Moreover, in the instant case there was a breach of the conditions upon which probation was granted. These conditions were that the petitioner (R. 9–10)—

> * * * entirely refrains from any violation of any law with the possible exception of parking and traffic ordinances, and in all respects conduct himself as a law abiding citizen.

Bearing in mind the fact that the first year of the probationary period was to be spent in jail, we submit that the petitioner did not conduct himself as "a law abiding citizen" when the evidence shows that in disregard of his commitment and in abuse of the obvious intent of an order permitting him to be taken to the dentist for treatment, he remained away from the jail on fifteen occasions during a three months' interval for periods ranging from four to twelve and a half hours, most of which time apparently was spent not with the dentist but in riding around and in enjoying the comforts of his home.

The petitioner contends that the conditions of his probation were not breached because he violated no law. In other words, he asserts that the condition that he should conduct himself "as a law abiding citizen" has the same meaning as the preceding condition in the probation order that he should refrain "from any violation of any law." As applied to a man who was to spend the first year of his probationary period in jail, we do not believe

that such a construction of the probationary order is sound. The requirement that the petitioner should "in all respects conduct himself as a law abiding citizen" was essentially one of good conduct. Prisoners have little opportunity to violate criminal laws, and in the light of this fact it seems clear that the District Judge, as indicated at the hearing on the revocation of probation (R. 21, 49), intended by the order of probation that sentence should be suspended only so long as the petitioner's behavior was good.[10] If the condition in question has the broader meaning which the District Judge evidently intended it to have, there was clearly a breach of it, for, as was said by the court below (R. 84), the petitioner "had taken advantage of a general permit to carry out his own purposes quite independently of the basis and theory upon which the order was given." His conduct was not consistent with any reasonable conception of the idea of good behavior, even for one in jail.

But even if the condition be given the stricter interpretation asserted by petitioner, we submit that there was a breach of it. Petitioner's abuse of the

[10] We do not think it goes too far to say that good conduct is an essential condition of every probation, whether expressly stated or not. This, indeed, would seem to be implied by the very meaning of the term. A declared aim of the statute was to encourage "industrious, law-abiding habits" by the creation of an "effective disciplinary system." See House Rept. No. 423, 68th Cong., 1st Sess., p. 2; Hearings of February 21, 1924, before a subcommittee of the Senate Judiciary Committee on S. 1042 and S. 1729, 68th Cong., 1st Sess., p. 14.

limited privilege conferred upon him of going to the dentist for treatment could not have occurred without the connivance of those who were charged with his custody. These officers could have been punished for contempt of court in disregarding the manifest intent of the order of commitment. If the petitioner was not equally guilty of contempt he was clearly a party to the flouting of the mandate of the commitment by the officers. In *United States* v. *Hoffman,* 13 F. (2d) 269, 272, affirmed, 13 F. (2d) 278, 280 (C. C. A. 7th), the court held under similar circumstances that the prisoner could be charged with conspiring with his custodians to commit a violation of Section 268 of the Judicial Code (U. S. C., Title 28, Sec. 385), which provides for the punishment of contempts of court. See also *In re O'Rourke,* 251 Fed. 768 (Mont.); *Ex Parte Shores,* 195 Fed. 627 (N. D. Iowa). The record shows active cooperation by at least one of the petitioner's custodians in the abuse by petitioner of the limited privilege accorded him to visit the dentist. (R. 25–26.)

The petitioner violated the law in other respects. The authority granted to him to visit the dentist obviously did not permit him to "ride around" and to visit and enjoy the comforts of his home for substantial periods, whether in or out of the custody of his guards at the time. By taking without warrant a greater liberty than he was entitled to under the order the petitioner under the common law rule

was guilty of an escape, so that while he was "riding around" and in his home, when he was supposed to be at the dentist's office, his status was that of an escaped prisoner. See *In re O'Rourke,* 251 Fed. 768 (Mont.); *Steere* v. *Field,* Fed. Cas. No. 13350 (R. I.), p. 1221; *Hobert's Case,* Cro. Car. 209; *Benton* v. *Sutton,* 1 Bos. & Pul. 24; *Riley* v. *State,* 16 Conn. 47, 51; *Hefler* v. *Hunt,* 120 Me. 10, 13; *In re Rigg,* 95 N. J. Eq. 341; *Colby* v. *Sampson,* 5 Mass. 310, 311. Cf. *Whitaker* v. *Commonwealth,* 188 Ky. 95, 97; *Wiggins* v. *State,* 194 Ind. 118, 120–121. Even if the rule of these cases is not applicable in the Federal courts,[11] the evidence seems clearly to establish that his custodians were guilty of a violation of Section 138 of the Criminal Code, which covers the offense of permitting prisoners to escape (*Ex Parte Shores,* 195 Fed. 627, 630 (N. D. Iowa); *Zimmerman* v. *United States,* 1 F. (2d) 712 (C. C. A. 6th); *In re O'Rourke,* 251 Fed. 768 (Mont.), *supra*), and that the petitioner, by his own testimony, was a party to a conspiracy to violate Section 138 (*United States* v. *Hoffman,* 13 F. (2d) 269,

[11] The Circuit Court of Appeals said (R. 84) that—

"The order of revocation was not based upon a technical escape but upon the fact that the appellant had not acted in good faith in carrying out the order of the trial Judge, * * *."

This statement does not appear to be a holding by the court below that the facts did not establish an escape, but merely comment upon the trial Judge's reasons for revoking the probation. Under the view of the statute held by the court below (R. 86–88) it was immaterial whether or not the petitioner had violated any law.

272, *supra; Ex Parte Lyman,* 202 Fed. 303 (W. D. Wash.)).

It thus seems clear that petitioner was guilty of a breach either of the condition that he should refrain "from any violation of any law" or that he should "in all respects conduct himself as a law abiding citizen."[12] The probation was therefore properly revoked under the interpretation of the statute enunciated in the *Hollandsworth case* as well as under that adopted by the court below.

CONCLUSION

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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NOVEMBER, 1932.

[12] Where revocation is sought upon the ground that the probationer has committed an offense, it is not necessary that the probationer be convicted, but only that the proof shall be such as to satisfy the District Judge that the offense has been committed. *Jianole* v. *United States*, 58 F. (2d) 115 (C. C. A. 8th), *supra; United States* v. *Bishop*, 47 F. (2d) 95, 97 (C. C. A. 5th).

APPENDIX

STATUTE INVOLVED

The Probation Act of March 4, 1925, c. 521, 43 Stat. 1259, 1260 (U. S. C., Title 18, Secs. 724–727), provides, in part, as follows:

> That the courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, shall have power, after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The court may revoke or modify any condition of probation, or may change the period of probation: *Provided,* That the period of probation, together with any extension thereof, shall not exceed five years.
>
> While on probation the defendant may be required to pay in one or several sums a fine imposed at the time of being placed on probation and may also be required to make restitution or reparation to the aggrieved party or parties for actual damages or loss

caused by the offense for which conviction was had, and may also be required to provide for the support of any person or persons for whose support he is legally responsible.

SEC. 2. That when directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable.

At any time within the probation period the probation officer may arrest the probationer without a warrant, or the court may issue a warrant for his arrest. Thereupon such probationer shall forthwith be taken before the court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed.

Section 3 provides for the appointment of probation officers.

SEC. 4. That it shall be the duty of a probation officer to investigate any case referred to him for investigation by the court in which he is serving and to report thereon to the court. The probation officer shall furnish to each person released on probation under his supervision a written statement of the conditions of probation and shall instruct him regarding the same. Such officer shall keep informed concerning the conduct and condition of each person on probation

under his supervision and shall report thereon to the court placing such person on probation. Such officer shall use all suitable methods, not inconsistent with the conditions imposed by the court, to aid persons on probation and to bring about improvements in their conduct and condition. Each officer shall keep records of his work; shall keep accurate and complete accounts of all moneys collected from persons under his supervision; shall give receipts therefor, and shall make at least monthly returns thereof; shall make such reports to the Attorney General as he may at any time require; and shall perform such other duties as the court may direct. A probation officer shall have the power of arrest that is now exercised by a deputy marshal.

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SUPREME COURT OF THE UNITED STATES.

No. 378.—October Term, 1932.

Jimmie Burns, Petitioner, *vs.* United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[December 5, 1932.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The Court granted certiorari to review the decision of the Circuit Court of Appeals affirming an order revoking probation. 59 F. (2d) 721. On a plea of guilty to three counts of an indictment, petitioner was sentenced, on May 4, 1931, on the first count to imprisonment for one year, on the second count to pay a fine of $2,000, and on the third count to imprisonment for five years. Execution of the last-mentioned sentence was suspended and the court granted probation upon the following terms,—"during such time as the defendant reports regularly every three months in writing, beginning with this date, to the federal probation officer of this court; during which time he entirely refrains from any violation of any law with the possible exception of parking and traffic ordinances, and in all respects conduct himself as a law-abiding citizen. In case of the violation of the terms of probation, the defendant will be brought before the court and sentenced. Probation is granted for a period of five years".

On January 21, 1932, while petitioner was serving his sentence on the first count, he was brought before the court, by its direction, for the purpose of investigating a report that he had violated the terms of probation. After a brief recess to permit the attendance of counsel for petitioner, the court held a summary hearing. A special agent of the Department of Justice testified that the jail records, a copy of which was produced, showed that on fifteen days between May 10th and August 18th, 1931, petitioner had been absent from the jail for long periods ranging from nearly four hours to over twelve hours; that an order had been made permitting him to visit a dentist for necessary dental work, but

that on August 18th the agent had found petitioner at his home. Petitioner was examined on his own behalf and from his cross-examination it appeared that on one occasion, when the record showed that he had been away from the jail from 10 a. m. until 9.06 p. m., he had been at his home in the evening "listening to the radio, something like that". He was unable to say how often he had gone to his home when he was supposed to be visiting the dentist; it was "quite a few times. Q. Most of the time? A. Pretty near". He further testified: "Q. When you left the jail and didn't go to the dentist's office, were you and Lessner [a deputy marshal] riding around or were you at your house and would Lessner ride around? Is that right? A. Yes". On redirect examination, petitioner added that when he was out he asked to be taken home to get a change of clothes; that usually each time he went to the house he went for a change of linen".

After petitioner had testified, the court, denying the request of petitioner's counsel for an opportunity to present further evidence, especially as to matters upon which the court did not base its conclusion, revoked the probation order. The court said that "there is enough obviously before this court to show that the spirit of the probation was not in any sense complied with". The Circuit Court of Appeals, reviewing petitioner's testimony at length, sustained the order as based not upon "a technical escape, but upon the fact that the appellant had not acted in good faith in carrying out the order of the trial judge, but, on the contrary, had taken advantage of a general permit to carry out his own purposes quite independently of the basis and theory upon which the order was given". 59 F. (2d) p. 724.

First. Petitioner objects to the summary character of the proceeding. He urges that he was entitled to previous notice of specific charges of violation of the terms of probation and to a hearing upon such charges according to the established rules of judicial procedure. As opposed to the action sanctioned below he invokes principles announced in *Hollandsworth* v. *United States* (C. C. A. 4th), 34 F. (2d) 423, 428, and in certain decisions of state courts dealing with procedure under state probation laws. See *State* v. *Zolantakis*, 70 Utah 296, 54 A. L. R. Ann. 1463, 1471, *note*.[1]

[1]See, also, Riggs *v.* United States (C. C. A. 4th), 14 F. (2d) 5, 9, 10; Furrow *v.* United States (C. C. A. 4th), 46 F. (2d) 647; *Ex parte* Lucero, 23 N. Mex. 433; State *v.* O'Neal, 147 Wash. 169; Plunkett *v.* Miller, 161 Ga.

The Federal Probation Act (March 4, 1925, c. 521, 43 Stat. 1259; U. S. C., Tit. 18, secs. 724-727), confers an authority commensurate with its object. It was designed to provide a period of grace in order to aid the rehabilitation of a penitent offender; to take advantage of an opportunity for reformation which actual service of the suspended sentence might make less probable. *United States* v. *Murray*, 275 U. S. 347, 357, 358; H. R. Rep. No. 423, 68th Cong., 1st Sess. Probation is thus conferred as a privilege and cannot be demanded as a right. It is a matter of favor, not of contract. There is no requirement that it must be granted on a specified showing. The defendant stands convicted; he faces punishment and cannot insist on terms or strike a bargain. To accomplish the purpose of the statute, an exceptional degree of flexibility in administration is essential. It is necessary to individualize each case, to give that careful, humane and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion. The provisions of the Act are adapted to this end. It authorizes courts of original jurisdiction, when satisfied "that the ends of justice and the best interests of the public, as well as the defendant, will be subserved", to suspend the imposition or execution of sentence and "to place the defendant upon probation for such period and upon such terms and conditions as they may deem best".

There is no suggestion in the statute that the scope of the discretion conferred for the purpose of making the grant is narrowed in providing for its modification or revocation. The authority for the latter purpose immediately follows that given for the former, and is in terms equally broad. "The court may revoke

466; Williams *v.* State, 162 Ga. 327; State *v.* Hardin, 183 N. C. 815; Weber *v.* State, 58 Ohio St. 616. Compare Campbell *v.* Aderhold (N. D. Ga.), 36 F. (2d) 366, 367; United States *v.* Mulligan (C. C. A. 2d), 48 F. (2d) 93, 94; Jianole *v.* United States, (C. C. A. 8th), 58 F. (2d) 115, 117; People *ex rel.* Forsyth *v.* Court of Sessions, 141 N. Y. 288; People *ex rel.* Pasco *v.* Trombly, 173 App. Div. (N. Y.) 497; People *ex rel.* Woodin *v.* Ottaway, 247 N. Y. 493, 497; Commonwealth *v.* McGovern, 183 Mass. 238; Finer *v.* Commonwealth, 250 Mass. 493; People *v.* Dudley, 173 Mich. 389, 392, 395; Richardson *v.* Commonwealth, 131 Va. 802, 810, 811; State *v.* Sullivan, 127 S. C. 186; State *v.* Miller, 122 S. C. 468, 473-475; People *v.* Sapienzo, 60 Cal. App. 626; People *v.* Sanders, 64 Cal. App. 1.

or modify any condition of probation, or may change the period of probation". There are no limiting requirements as to the formulation of charges, notice of charges, or manner of hearing or determination. No criteria for modification or revocation are suggested which are in addition to, or different from, those which pertain to the original grant. The question in both cases is whether the court is satisfied that its action will subserve the ends of justice and the best interests of both the public and the defendant. The only limitation, and this applies to both the grant and any modification of it, is that the total period of probation shall not exceed five years. Act of March 4, 1925, sec. 1.

Such procedural provisions as the Act contains harmonize with the view that the continuance of the probation, as well as the grant of it, rests in the court's discretion. The probation officer, when directed by the court, must report to the court with a statement of the conduct of the probationer. "The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable." *Id.*, sec. 2. The broad authority of the court remains unimpaired. At any time within the probation period, the probationer may be arrested, either with or without warrant, and thereupon he "shall forthwith be taken before the court". Also, after the probation period has expired, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before it. "Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed". *Id.*

The duty placed upon the probation officer to furnish to each probationer under his supervision "a written statement of the conditions of probation" and to "instruct him regarding the same" (*id.*, sec. 4) cannot be deemed to restrict the court's discretion in modifying the terms of probation or in revoking it. The evident purpose is to give appropriate admonition to the probationer, not to change his position from the possession of a privilege to the enjoyment of a right. He is still a person convicted of an offense, and the suspension of his sentence remains within the control of the court. The continuance of that control, apparent from the

terms of the statute, is essential to the accomplishment of its beneficent purpose, as otherwise probation might be more reluctantly granted or, when granted, might be made the occasion of delays and obstruction which would bring reproach upon the administration of justice. See *Campbell* v. *Aderhold,* 36 F. (2d) 366, 367; *United States* v. *Mulligan,* 48 F. (2d) 93, 94; *Jianole* v. *United States,* 58 F. (2d) 115, 117; *Commonwealth* v. *McGovern,* 183 Mass. 238; *People ex rel. Pasco* v. *Trombly,* 173 App. Div. (N. Y.) 497, 499; *Richardson* v. *Commonwealth,* 131 Va. 802, 810, 811; *People* v. *Dudley,* 173 Mich. 389, 392, 395; *People* v. *Sanders,* 64 Cal. App. 1.

The question, then, in the case of the revocation of probation, is not one of formal procedure either with respect to notice or specification of charges or a trial upon charges. The question is simply whether there has been an abuse of discretion and is to be determined in accordance with familiar principles governing the exercise of judicial discretion. That exercise implies conscientious judgment, not arbitrary action. *The Styria,* 186 U. S. 1, 9. It takes account of the law and the particular circumstances of the case and "is directed by the reason and conscience of the judge to a just result". *Langnes* v. *Green,* 282 U. S. 531, 541. While probation is a matter of grace, the probationer is entitled to fair treatment, and is not to be made the victim of whim or caprice.

Second. Applying these principles, it is apparent that the instant case has the peculiar feature that the probationer was actually serving a jail sentence while on probation with respect to another sentence. But, even in jail, he was subject to the conditions of the probation. By its terms, he was to refrain from violation of law and "in all respects conduct himself as a law-abiding citizen". As, at the same time that the sentence in question was suspended and probation was granted, he was committed to jail upon a distinct sentence, there was also a condition necessarily implied that he should not be guilty of conduct inconsistent with obedience to that sentence. Abuse of the liberty granted him to leave the jail for a particular purpose, and absenting himself in the circumstances described in his testimony,—apart from the question of violation of law (see Act of May 14, 1930, c. 274, sec. 9, 46 Stat. 325, 327; U. S. C., Tit. 18, sec. 753h)—was clearly a breach of that condition and the court was entitled to take note of it.

There is, properly speaking, no question here of notice. Defendant was brought before the court and questioned. Defendant was not only heard but gave his testimony. The inquiry related to his own conduct in connection with his leaving the jail, and the court could properly restrict the examination to what was pertinent to that conduct and could refuse to extend the inquiry to embrace other matters. The hearing was summary but it cannot be said that it was improper or inadequate, in view of the nature of the proceeding and of the particular point upon which the court rested its decision. The court revoked the probation upon defendant's admissions of his dereliction and it does not appear that there was an abuse of discretion.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.